Supreme Court, U.S.
FILED

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

EVA M. GATES, Petitioner,

v.

COUNTY OF SAN LUIS OBISPO; SUPERIOR COURT, COUNTY OF SAN LUIS OBISPO; BARRY HAMMER; CHRISTOPHER HELENIUS, ESQ.; SHARON F. BILLON, M.D. A PROFESSIONAL CORPORATION; ELENA MARTINHO, M.D.; SUSIE MORTON; MARVIN A. BAUER, ESQ.; BAUER, HARRIS & McEVOY; SOUTHERN CALIFORNIA PHYSICIANS INSURANCE EXCHANGE; COMPEX, INC.; and DOES 1 through 10,

Respondents

On Petition For Writ of Certiorari
To The Court of Appeal of the State of California,
Second Appellate District, Division Six; To The Superior
Court of San Luis Obispo County, State of California

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Did appellate court in Affirming the trial court ruling sustaining demurrers on the basis of res judicata and collateral estoppel violate constitutional due process right of collateral attack on issue of disclosure of confidential medical records when ruling on demurrers made in excess of jurisdiction, violating "Notice of Stay" by virtue of California Code of Civil Procedure Section 391.6?

2. Did appellate court's ruling the trial court had jurisdiction while party's verified writ to vacate the lower court's order and limit disclosure of confidential medical records was pending in the appellate court, constitute a violation of due process and equal protection of the law?

3. Did sustaining demurrers without leave to amend during pendency of "STAY" by virtue of California Code of Civil Procedure Section 391.6 constitute a violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States?

4. Did failure to issue a "STAY" , requested in a verified pleading, constitute a violation of the due process clause in the Fourteenth Amendment of the Constitution of the United States?

5. Did filing a verified writ of mandate/prohibition, and request for "IMMEDIATE STAY", divest the lower court of subject matter jurisdiction by virtue of California Code of Civil Procedure Section 916?

6. Did enforcement of an order entered in the clear absence of all jurisdiction constitute a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States?

7. Did failure to notice entry of order, entered on July 6, 1994 in the clear absence of all jurisdiction, constitute a violation of due process clause of the Fourteenth Amendment to the Constitution of the United States?

8. Did the invalid order, entered on July 6, 1994 constitute privileged communication to make applicable the litigation privilege under California Civil Code Section 47(b)?

9. Did amending an original subpoena, and serving it as an original subpoena to obtain confidential medical records 13 days before trial, absent leave of court, violate due process and equal protection clause of the Fourteenth Amendment?

10. Did the lower courts fail to follow the doctrine of stare decisis and prior Supreme Court decisions in ruling Judge Hammer absolutely immune for acts performed in the clear absence of all jurisdiction?

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## OPINIONS BELOW

The Opinion of the Court of Appeal dated October 29, 1996, whose judgment is herein sought to be reviewed is 2nd Civil No. B101415, App. 1; the judgments of the trial court is San Luis Obispo, California Case No. CV 078100, App. 7, App. 13, App. 13, App. 15, App. 15, App. 19, App. 23, App. 17, Appeal denied petition for rehearing, App. 24, request for judicial Notice on November 26, 1996, App. 25. Gates filed petition for review in California Supreme Court, denied on January 22, 1997, App. 26. Remittitur issued February 6, 1997, App. 27. The Opinion is unpublished and is reprinted in the appendix attached to this petition, App. 1. Interlocutory judgments and orders of the lower courts, omitted from the Opinion, are reprinted in the appendix.

## PRELIMINARY STATEMENT

This court did not docket Petition for Writ of Certiorari in the underlying case, 2nd Civil No. B091098, Gates v. Sharon F. Billon, M.D., et al., due to untimely delivery of documents in December 1996.

## STATEMENT OF JURISDICTION

Jurisdiction is conferred upon this Honorable Court by 28 USCS 1257 (a) of the United States Code, and on grounds Gates' petition for review was denied by the highest state court on January 22, 1997.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Fourteenth Amendment, App.186, California Constitution, Article I, Section 1, App.186. Supreme Court's Views as to Civil Liability of

Judges; Annotation: 42 USC 1983; California Evidence Code Sections 452, 453, App. 50, Government Code Section 815.3, App.14, Business and Professional Code Sections 6068 (a) and (b) Federal Rules of Court, Rule 8 (a) (2); California Code of Civil Procedure Sections 391.6, App.192 , 262.1, App.192, 916 App.193, 1072, App.194, 2017 (a), App.195,1911 ,App 194, and 2036 (a),App.195 ,California Rules of Court 56 (c), App.187, San Luis Obispo Superior Court Rules, Rule 7.06 (c), App.188, California Civil Code Sections 47, App.189, and Section 56, App.189.

## STATEMENT OF THE CASE

This case derived from a prior medical malpractice action, San Luis Obispo California Superior Court Case No. CV 074413 (B091098), Gates v. Sharon F. Billon, M.D., et al., wherein it was alleged Gates' constitutional rights of due process were violated and unlawful disclosure of her confidential medical records violated her constitutional right of privacy.

On October 23, 1995, Gates brought this action against COUNTY OF SAN LUIS OBISPO; SUPERIOR COURT, COUNTY OF SAN LUIS OBISPO; JUDGE BARRY HAMMER, who was the trial court judge in the malpractice case; and appointed REFEREE CHRISTOPHER HELENIUS, ESQ, as discovery referee, who admitted he was not medically qualified to perform in-camera review of medical records, App. 96.

SHARON F. BILLON, M.D., A PROFESSIONAL CORPORATION; ELENA MARTINHO, M.D.; and SUSIE MORTON, R.N., defendants in the malpractice action; MARVIN A. BAUER, ESQ., and his law firm BAUER, HARRIS & McEVOY, counsel for malpractice defendants; COMPLEX, INC., who copied, reproduced and circulated GATES' medical records; and SOUTHERN CALIFORNIA PHYSICIANS INSURANCE EXCHANGE

("SCPIE"), liability insurer in the malpractice action. These herein named defendants are not the same defendants named in the prior action, except BILLON, MARTINHO and MORTON, who are being sued on different grounds.

GATES alleged seven causes of action: 1) wrongful disclosure of confidential medical records and information; 2) violation of constitutional right of privacy; 3) violation of civil rights and denial of due process and equal protection of law, and denial of a fair trial; 4) violation of statutes; 5) negligent infliction of emotional distress; 6) intentional infliction of emotional distress; and 7) exemplary damages. These causes of action are not based on the same acts, or omissions to act, or the causes of action litigated in the underlying case.

All Respondents demurred to Gates' complaint. The court sustained, COUNTY and SUPERIOR COURT'S demurrers without leave to amend on grounds of judicial immunity, the complaint does not state facts sufficient to constitute a cause of action, and that GATES failed to plead with particularity. Order filed on January 17, 1996, App. 5; Judgment of Dismissal filed February 5, 1996, App. 7; Notice of Entry of Judgment of Dismissal filed March 5, 1996, App. 9.

The court sustained Judge Hammer and Referee Helenius' demurrers without leave to amend on grounds of judicial immunity, the complaint does not state facts sufficient to constitute a cause of action, and that under the applicable substantive law there can be no liability on any cause alleged, Order filed on January 29, 1996, App. 10, Judgment of Dismissal filed March 20, 1996, App. 13, Notice of Entry of Judgment of Dismissal filed March 21, 1996, App. 14.

The court sustained COMPEX'S demurrer without leave to amend on grounds COMPEX, INC'S conduct is privileged pursuant to litigation privilege of California Civil Code Section 47 (b); that the second cause of action fails to

state facts sufficient to constitute a cause of action for violation of a constitutional right to privacy, that claims are barred by the doctrine of collateral estoppel. Order Sustaining Defendant COMPEX, INC'S Demurrer Without Leave to Amend and Judgment of Dismissal filed January 31, 1996, App. 17, Notice of Entry of Judgment of Dismissal of Dismissal filed March 14, 1996.

The court sustained SCPIE'S demurrer without leave to amend on; "the Court took judicial notice of all matters objections to Defendants' requests to take judicial notice," and " . . . Dismissed with prejudice . . ." Order of Dismissal filed on January 24, 1996, App. 15, Notice of Entry of Judgment of Dismissal filed on March 4, 1995.

The court sustained BAUER, HARRIS & McEVOY'S demurrers without leave to amend on grounds the complaint fails to state facts to constitute a cause of action, that Respondents' conduct is privileged pursuant to Civil Code Section 47 (b), and claims are barred by the doctrine of collateral estoppel. Order and Judgments of Dismissal filed on January 23, 1996, App. 19, Notice of Entry of Judgment of Dismissal filed February 1, 1996.

The court sustained BILLON, MARTINHO, and MORTON'S demurrers on grounds the complaint does not state facts sufficient to constitute a cause of action. Order filed on February 8, 1996, App. 21, Notice of Entry of Judgment/Order filed February 14, 1996, App. 23.

On December 27, 1995, before the trial court ruled on the above demurrers, Respondent JUDGE HAMMER and REFEREE HELENIUS filed Motion for Order Designating Plaintiff as Vexatious Litigant, Request for Order Requiring Security and Notice of Stay, App. 130. At this hearing GATES brought the "Notice of Stay", to the court's attention. The court acted in excess of jurisdiction, failed to acknowledge the "Notice of Stay" filed pursuant to California Code of Civil Procedure Section 391.6, staying

all proceedings until the motion was heard and ruled on, App On January 18, 1996, Hon. Kenneth Andreen, judge assigned, granted the motion for order designating GATES as vexatious litigant, for order requiring GATES post security, and for order requiring GATES to obtain prefiling order from judge of superior court before filing any new litigation against any judge, referee or court officer. The order, filed March 20, 1996, failed to state grounds for the Court's orders, App. .

On December 15, 1995 GATES served Notice of Taking Deposition on Respondents JUDGE HAMMER and MARVIN A. BAUER, ESQ. On December 28, 1995 JUDGE HAMMER filed his motion for order declaring GATES a vexatious litigant, and on December 29, 1995 BAUER filed Motion for Protective Order and Request for Sanctions. BAUER did not request the court take his motion off calendar until after GATES filed her opposition on January 24, 1996, a violation of San Luis Obispo Superior Court Rules, 7.06 (c), App.188 . At hearing on January 31, 1996, Judge pro tem, Charles Piccuta, ruled: "Bauer's motion for protective order is now moot, his motion is ordered off calendar." The court failed to state grounds for its ruling. App. 183 .

In this action Respondent "SCPIE" filed Request to Augment Record on July 16, 1996, App. 28, attaching the court's June 18, 1996 Opinion from the underlying action as Exhibit "A", App. 29. GATES filed Request Court Take Judicial Notice, and Objection to Court arbitrarily taking judicial notice of the request to augment the record, App. 36. Respondents COUNTY, SUPERIOR COURT, JUDGE HAMMER and REFEREE HELENIUS filed Joinder in Request to Augment the Record of "SCPIE" on July 24, 1996, App. 34. On August 1, 1996 the appellate court ORDERED: "Respondents' Motion to Augment the Record shall be considered as a request to take judicial notice and is hereby GRANTED", App. 56. GATES repeatedly

requested the trial court and court of appeal to take judicial notice of essentially the same evidence she submitted throughout litigation, which the courts repeatedly denied, App. 25, App. 39, App. 42, App. 47, App. 57. On August 26, 1996 the Court of Appeal finally granted GATES motion to take judicial notice of evidence, App. 57, on the same order DENIED GATES' objection to the appellate court granting Respondents' notice of its June 18, 1996 Opinion, B091098, rendered on August 1, 1996, which was not a noticed motion before the court. App. 28.

The underlying medical malpractice and abandonment action, San Luis Obispo Case No. 074413 was tried before a jury with Respondent JUDGE HAMMER presiding at trial. Judgment on Special Verdict was filed on December 6, 1994, App. 53. JUDGE HAMMER did not recuse himself despite his being a Defendant in an ongoing case, SLO Case No. CV 075846 (B094604) in which GATES is Plaintiff/Petitioner, now pending review for certiorari in this court.

During discovery and prior to trial GATES was denied due process and equal protection of the law by the Court and court appointed Referee in their failure to afford GATES a full and equal opportunity to litigate the unlawful disclosure of her confidential medical records and denied inspection of the area where injectable medications were purportedly stored, deposition of Dr. Billon, as an individual, failed to conduct timely In Camera review and fashion a protective order to limit disclosure of records, and failed to issue a stay in the proceedings of the court and enforcement of the order from which GATES had appealed, App. 58, 69, 79.

GATES alleges that in the trial court her constitutional privacy rights were violated, by the unlawful disclosure of her medical records, on an invalid order entered by JUDGE HAMMER in the clear absence of all

jurisdiction, while GATES' writ to prohibit or limit disclosure was pending in the court of appeal, App. 58.

At trial JUDGE HAMMER admitted into evidence medical records disclosed by BILLON, MARTINHO and MORTON before litigation commenced in violation of California Confidential Medical Information Act, California Civil Code Section 56, App.189 , medical records of Harold D. Segal, M.D. obtained on a fraudulently amended subpoena, thirteen days before trial absent leave of court, App. 83, 85, and medical records of five health care providers obtained by COMPEX for Respondents on the invalid order issued by JUDGE HAMMER in the clear absence of all jurisdiction. App. 69.

GATES' federally protected rights were violated by the trial court and Referee's acts, or omissions to act, in the clear absence of all jurisdiction, exercising the Referee's May 24, 1994 Statement of Decision App. 70, and the October 4, 1994 Statement of Decision App. 112, absent valid orders of the court upholding those decisions and using the advisory statements of decision as orders of the court.

## ARGUMENT

JUDGE HAMMER acted with knowledge and notice that GATES had filed her verified writ of mandate/prohibition with "STAY REQUESTED", which divested the trial court of subject matter jurisdiction, on June 17, 1994, App. 58. GATES served notice on the presiding judge of SUPERIOR COURT, App. 68, the trial judge, App. 67, and REFEREE HELENIUS, App. 67. JUDGE HAMMER had no power of jurisdiction to do any act as a "Court" in the issuance or enforcement of an order affecting disclosure of confidential medical records.

California Code of Civil Procedure Section 396 provides:

"Court must suspend all further proceedings

> when it appears from verified pleadings that the determination of the action will involve questions outside its jurisdiction, plainly speaking of jurisdiction of the subject matter."

Where Section 396 applies, its provisions for transfer of the cause are mandatory, therefore any order relating to parties or pleadings are void. Schwenke v. J.P. Scott, Inc. (1988 6th Dist.) 205 Cal.App. 71, 77, 252 Cal.Rptr. 91.

Here, the order entered by JUDGE HAMMER on July 6, 1994, App. 69, upholding the REFEREE'S decision of May 24, 1994, App. 70, while GATES' verified writ App. 58, was pending before the appellate court, and prior to appellate decision on July 14, 1994, App. 79, does not constitute a valid order of the court and is therefore void.

Subsequent to the void order and reinvestment of jurisdiction the court took no further action and failed to issue a valid order upholding the REFEREE'S decision. Therefore the confidential medical records, including those not relevant to the issues, unlawfully obtained and submitted as evidence were not legally before the court and jury. The unlawful acquisition and submission constituted a violation of the privacy act and Article I, Section 1 of the California Constitution. App.186, and a violation of the due process clause of the Fourteenth Amendment of the United States Constitution.

The Court and BAUER failed to give GATES notice of the order entered on July 6, 1994, which violated not only statutory notice requirements but fundamental principles of due process of both California Constitution, Article I, Section 7, and the Fourteenth Amendment of the United States Constitution. App.186, App.186 .

RESPONDENTS intentionally failed to serve GATES a notice of entry of the July 6, 1994 order, allowing them to move forward in stealth and obtain GATES' confidential medical records unrelated to the issues, and unlawfully gain an unfair advantage at trial. These

cumulative acts by the Court, REFEREE and defense counsel BAUER were unconstitutional, prejudicial and deprived GATES of due process and equal protection of law and a fair trial under the Fourteenth Amendment.

The Court of Appeal's Opinion dated June 18, 1994, directly conflicts with prior supreme court holdings and failed to state reasons for its decision, therefore acted in excess of its jurisdiction in failure to adhere to the doctrine of stare decisis. Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 456, 20 Cal.Rptr. 321; see also Atchison, T. & S.F.R. Co. v. Witchita Board of Trade (1973) 412 U.S. 800, 31 L.Ed.2d 350, 93 S.Ct. 2367.

Failure to issue valid orders upholding the REFEREE'S decisions of May 24, 1994 and October 4, 1994 constitutes unconstitutional irregularities in the proceedings of the court materially affecting the substantial rights of GATES and is within the meaning of California Code of Civil Procedure Section 657 (1), grounds for a new trial based on error in law, materially affecting GATES substantial rights and prevented a fair trial.

APPELLATE OPINION OMITS FACT TRIAL COURT GRANTED DEMURRERS WITHOUT LEAVE TO AMEND WHILE PROCEEDINGS STAYED BY JUDGE HAMMER AND REFEREE HELENIUS' MOTION FILED UNDER CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 391, ET SEQ.

On December 27, 1995, Respondents HAMMER and HELENIUS filed motion for order declaring GATES as vexatious litigant under California Code of Civil Procedure Section 391.6, Request for Order Requiring Security, and "Notice of Stay", App. 130. Vexatious litigant statute Section 391.6 is jurisdictional and stays proceedings in the court, and is not subject to interpretation.

At hearing of opposition to demurrers on December 29, 1995, the Court exceeded its jurisdiction, and over GATE'S objections, sustained COUNTY, SUPERIOR COURT, JUDGE HAMMER, and REFEREE HELENIUS' demurrers without leave to amend, in violation of the "Notice of Stay".

The trial court sustained demurrers of all Respondents in this action without leave to amend before the Vexatious Litigant Motion was brought to a final determination, violating procedural due process while proceedings were stayed by statute.

GATES' complaint addressed deprivation of constitutional right of privacy under the California Constitution, Article I, Section 1.

The allegations are the essential elements of a denial of due process under the Fourteenth Amendment of the United States Constitution.

Respondents failed to meet their burden of proving GATES a vexatious litigant. The courts have denied this pro per appellant her constitutional rights. Section 391 (b) (3) not being applicable has denied discovery and prevented GATES from moving forward with her case, by granting demurrers without leave to amend and dismissing all defendants. Section 391 (b) (4) has not, and cannot be proven by evidence presented by defendants, for there is none.

Respondents' vexatious litigant motion was based on a prior case, San Luis Obispo Superior Court Case No. CV 61331, in which GATES was the prevailing party, notwithstanding that the case was not within the scope of review pursuant to California Code of Civil Procedure Section 391, which bases a vexatious litigant on number of cases lost in a specified time. The judge must consider evidence, written or oral, by witness or affidavit, material to the ground of the motion, California Code of Civil Procedure Section 391.2. Respondents did not support their motion

with evidence, but mere conclusions. Muller v. Tanner (1969) 2 Cal. App.3d 445, 82 Cal.Rptr, 738.

The trial court's ruling is severe, unwarranted, prejudicial and under color of law, applied the statute absent evidence to support its ruling and deprived GATES of a constitutional right of redress, in the courts, for the wrongs perpetrated against her. The courts declaring GATES as "vexatious litigant" based on "unnecessary and frivolous discovery" in the absence of any discovery, is unreasonable and under the circumstances presented the lower court's actions constitutes deprivation of due process and equal protection of law.

## IMMUNITY UNAVAILABLE FOR ACTS ABSENT SUBJECT MATTER JURISDICTION AND STATUTORY AUTHORITY

The appellate opinion misinterprets the issues on appeal and failed to order a "STAY" as requested in the pleading submitted to appellate court, and on that basis alone the appeal should not have been denied.

On June 17, 1994, appellant timely filed in the appellate court a writ of mandate/prohibition, "STAY REQUESTED", with notice and service on the trial court, JUDGE HAMMER and REFEREE HELENIUS, to vacate the lower court's order and limit disclosure of medical records. This appeal divested the trial court of subject matter jurisdiction in the issue presented. App. 58.

Perfecting the appeal by filing a verified writ with "STAY REQUESTED" rendered appellate court jurisdiction over the subject matter of the superior court order appealed from therein. California Code of Civil Procedure Section 916, 396; County of Ventura v. Tillett 133 Cal.App.3d 105, 183 Cal.Rptr. 741.

The Opinion cites Mireles v. Waco (1991) 502 U.S. 9, 11, 12, 116 L.Ed.2d 9, 112 S.Ct. 286; Howard v. Drapkin

(1990) 22 Cal.App.3d 843, 851; Baar v. Tigerman (1983) 140 Cal.App.3d 979, 985. These cases are neither persuasive nor applicable to the issue of judicial immunity to support the erroneous affirmation of the trial court's ruling. In Mireles the judges actions: a) were taken in his judicial capacity, b) parties were dealing with the judge in his official capacity, c) the relevant inquiry of the particular acts were in relation to a general function normally performed by a judge, and (2) the authorized alleged use of force was taken in aid of the judge's jurisdiction over the matter before him. In the instant JUDGE HAMMER'S actions: a) absent subject matter jurisdiction, were not taken in his judicial capacity, b) signing and entering orders absent jurisdiction is not a function normally performed by a judge, c) signing and entering orders absent jurisdiction is not to the expectations of the parties.

Judicial immunity attaches only to actions undertaken in a judicial capacity. Forrester v. White, 484 U.S. 219, 227-229, 98 L.Ed.2d 555, 108 S.Ct. 538 (1988). In determining whether an action is "judicial" the court considers the nature of the act and whether it is a function normally performed by a judge. Stump v. Sparkman, 435 U.S. 349, 362, 55 L.Ed.2d 331, 98 S.Ct. 1099 (1978). A judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction. Id. at 356, 357, 55 L.Ed.2d 331, 98 S.Ct. 1099; Bradley v. Fisher 80 U.S. (13 Wall) 335, 351, 20 L.Ed. 646.

It has been the settled doctrine of courts in the United States as there being a distinction between acts done in excess of jurisdiction and acts performed in the clear absence of all jurisdiction over the subject matter. Lack of subject matter jurisdiction can be raised at any time, even for the first time on appeal. De Tomaso v. Pan American World Airways, Inc. (1987) 43 Cal.3d 517, 520 fn. 1, 235 Cal.Rptr. 292.

Local governments, such as COUNTY OF SAN LUIS OBISPO and SUPERIOR COURT, are "persons" subject to liability under 42 USC 1983 for violating another persons federally protected rights, and thus are not immune from suit under 42 USC 1983. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 701, 56 L.Ed.2d 611, 98 S.Ct. 2018.

A state official claiming immunity from liability under section 1983 has the burden of demonstrating his entitlement thereto. There is no constitutional based privilege immunizing judges from being required to testify about their judicial conduct. Judges can be found criminally liable under 18 USC Section 242, the criminal analog of Section 1983. Dennis v. Sparks, 449 U.S. 24, 66 L.Ed.2d 185, 101 S.Ct. 183. Judges are not immune from liability for damages under Civil Rights Act. 42 USC 1983, 1985. Peterson v. Stanczak, 48 F.R.D. 426 (1969).

Respondents, citing Stump, did recognize in their demurrers that judges are not "totally immune" from civil prosecution. The general rule is that judges are immune from suit for judicial acts within and even in excess of their jurisdiction even if those acts were done maliciously or corruptly, the only exception to this sweeping cloak of immunity exists for acts done in the clear absence of all jurisdiction. Bradley, Supra.

As the court held in Bradley, p. 351-352: "Where there is clearly no jurisdiction of the subject matter, any authority exercised when want of jurisdiction is known to the judge, no excuse is permitted". Therefore entry and enforcing of the July 6, 1994 order constituted an act in the clear absence of all jurisdiction of the subject matter and absolute immunity is unavailable to Respondent JUDGE HAMMER and REFEREE HELENIUS. It cannot be argued there is any reasonable ground for the assumption of jurisdiction and that immunity applies. Bradley Supra at 646, 647. See also Annotation: Supreme Court's Views as

to Civil Liability of Judges, 55 L.Ed.2d 850-856; and Stump, Supra at 356-357.

In Howard, citing Green v. Zank, 158 Cal.App.3d497, 504, 204 Cal.Rptr. 710, the Court held, "All authorities recognize that when a judge acts in a clear absence of all jurisdiction he is not protected." Therefore immunity is not absolute and under the circumstances presented is unavailable.

In Barr, the court sustained Tigerman's demurrers solely on the ground of arbitral immunity, and thus did not evaluate whether a cause of action was stated in any of several legal theories. In the instant the court action was clearly beyond its jurisdiction where Respondents' demurrers were sustsined without leave to amend, while a "STAY" noticed on a motion under California Code of Civil Procedure, Section 391 was pending, does not constitute a judgment on the merits. Notwithstanding a ruling in the absence of jurisdiction it cannot be said the complaint does not state a cause of action.

The court failed to evaluate if a cause of action was stated. Therefore the judgment is not on the merits and taking the allegations of the complaint as true GATES was deprived of a constitutional right of due process. Appellant should be granted leave to amend if the court finds the complaint deficient.

The trial court granted Respondent's demurrers based on the theory of absolute immunity and litigation privilege. The Order is ambiguous as to whether a cause of action was stated. Gates set forth in particularity, facts in several causes of action. If there are several causes of action in the complaint, a demurrer to the entire complaint will be overruled if any cause of action is therein stated. Stearns Ranchos Co. v. Atchison, T&SF Ry (1971) 19 Cal.App;3d 24, 36, 96 Cal.Rptr. 217.

As required by California Government Code Section 815.3 Appellant has not failed to name co-defendants, other

officers representing the public entity such as judge and referee, acting in and for the COUNTY and SUPERIOR COURT, whose acts were not within the claimed immunity. Stump at p. 355-353, and Bradley at p. 351-352.

In Monell, the Supreme Court held that a local government may be liable under Section 1983 for an injury caused by a "policy or custom" . . . made by its lawmakers or . . . those whose edicts or acts may fairly be said to represent official policy . . ." These constitutional deprivations may be visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels. Monell, Supra p. 694.

State law immunities do not override a cause of action under 42 USC 1983. Local governments sued under Section 1983 cannot be entitled to an absolute immunity, least today's decision "be drained of meaning." Scheuer v. Rhodes, 416 U.S. 232, 248, 40 L.Ed.2d 90, 94 S.Ct. 1683. Appellate Court Opinion omits the fact that Respondent JUDGE HAMMER'S immunity status changed when he signed and entered the July 6, 1994 order in the clear absence of all jurisdiction. He waived his judicial capacity and immunity, if there be any, acting in the clear absence of all jurisdiction and lost "absolute immunity" defense. The appellate court violated statutes and court rules and denied due process and equal protection of the law in ruling in its Opinions, that the trial court had jurisdiction to order disclosure of GATES' confidential medical records on July 6, 1994, prior to its July 14, 1994 decision on GATES' writ filed June 17, 1994.

LITIGATION PRIVILEGE OF CALIFORNIA
CIVIL CODE SECTION 47 (b) PREEMPTED
IN SUITS UNDER 42 USC SECTION 1983

The trial court, sustained demurrers without leave to amend on the basis of California Civil Code Section 47 (b), in the absence of subject matter jurisdiction.

The unlawful disclosure of confidential medical records, based on an invalid order, entered on July 6, 1994, was not litigated in the underlying case nor fully addressed by the appellate court. Both courts totally disregard Respondents' unlawful conduct ruling them either immune or privileged by virtue of California Civil Code Section 47 (b).

The graveman of GATES' complaint was that Respondents, acting under color of law, and absent a valid court order, agreed and unlawfully obtained GATES' confidential medical records subject to the five subpoenas, "STAYED" pursuant to California Code of Civil Procedure Section 916 while subject matter jurisdiction was vested in the Court of Appeal and constitutes a violation of the due process clause of the Constitution of the United States. Respondent BAUER aided and abetted on behalf of the other Respondents for the improper purpose of obtaining confidential information as evidence to gain an unfair advantage at trial, thereby violating the privacy act.

Here, GATES sought damages, not just for unlawful conduct and invasion of privacy, but for disclosed records not being legally before the court and jury that was prejudicial and denied GATES a fair trial in the underlying case.

On July 13, 1994 the Referee's May 24, 1994 Statement of Decision, absent a valid order of the court, was unconstitutionally enforced and the five subpoenas "STAYED" by California Code of Civil Procedure Section 916 were executed.

When a statute requires the court to exercise its jurisdiction in a particular manner, follow a particular procedure, or be subject to certain limitations, an act beyond those limits is in excess of jurisdiction and void. Vershbow

v. Reiner (1991) 231 Cal.App.3d 819, 883, 282 Cal.Rptr. 684.

Respondents' failure to notice GATES entry of the invalid July 6, 1994 order , App.69, intentionally kept GATES in ignorance of the unlawful enforcement of the five subpoenas and disclosure of privileged and confidential information from the time JUDGE HAMMER entered the order on July 6, 1994 through September 27, 1994, when COMPEX, INC. admitted that on July 13, 1994 they executed the five subpoenas and obtained confidential medical records. Intentionally keeping GATES ignorant of the unlawful disclosure constitutes "extrinsic fraud", and is not covered by the litigation privilege under California Civil Code Section 47(b). Silberg v. Anderson (1990) 50 Cal3d 205, 266 CalRptr 638.

"A judgment has been obtained by 'extrinsic fraud' where the aggrieved (has been) deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense." Moore v. Conlife (Cal 1994) 871 P.2d 204, 209 fn. 5, Kimes v. Stone, 84 F.3d 1121 (9th Cir. 1996).

Notwithstanding that Section 47 (b) does not extend to unlawful conduct, the lower courts erred in relying on 47 (b) privilege to dismiss GATES' complaint. Conduct by persons acting under color of law which is wrong under 42 USC 1983 or 1985 (3) cannot be immunized by state law. Kimes Supra; See Sosa v. Hiraoka, 920 F.2d 1451, 1460 fn. 3 (9th Cir. 1990), (noting the Supreme Court has "held that state law immunities have no force against Section 1983 suits where the state law immunity purports to provide immunity over and above those already provided in Section 1983"). (Quoting Howlett v. Rose, 496 U.S. 356, 315, 110 S.Ct. 2430, 2442, 110 L.Ed.2d 332 (1990); see also Palmer v. City of Monticello, 31 F.3d 1449, 1504, (10th Cir. 1994). Thus, the litigation privilege in Section 47 (b) is not applicable to bar a civil suit under 42 USC 1983. Martinez v.

California, 444 U.S. 277, 284 fn. 8, 100 S.Ct. 553, 558 fn. 8, 62 L.Ed.2d 481 (1980).

Based on unlawful disclosure of confidential medical records, absent a valid order of the court, a complaint based on such conduct, under color of law, is sufficient to support a claim under 42 USC 1983.

The court's holding in Kimes Supra, makes clear that Respondents, including defense attorneys are private parties and section 1983 subjects any person who deprives another of a constitutional right under color of law to civil liability for that deprivation, 42 USC 1983, (1994).

Here, GATES was not only kept in ignorance of the unlawful disclosure of confidential medical records, by Respondents failure to notice, but was deliberately kept in ignorance of the entry of the July 6, 1994 invalid order and the enforcement of that order while the writ was pending before the appellate court, with "STAY REQUESTED", App.58.

Further, and subsequent to the first disclosure, Respondants obtained from Dr., Harold D. Segal, confidential medical records, on a fraudulently amended subpoena served as an original subpoena, in violation of the discovery act, causing disclosure of GATES" medical records 13 days before trial, California Code of Civil Procedure, Section 1985.3 and 2024(a). App. 85.

## COLLATERAL ESTOPPEL/RES JUDICATA NOT BAR TO ISSUES NOT LITIGATED NOR CASE AGAINST NEW DEFENDANTS

The appellate opinion overlooks the exception to the doctrine of res judicate. In City and County of San Francisco v. Ang (1979) 97 Cal App3d 613, 679, 159 Cal Rptr 56, the court held: unconstitutional permit conditions was in excess of the comission's jurisdiction and thus can be collaterally attacked. If a tribunal has subject matter jurisdiction, its

decision will be res judicata not withstanding the decision was incorrect.

In the prior action the court entered an order in the clear absence of subject matter jurisdiction . App. 69 . In the instant, the court acted in excess of its jurisdiction in sustaining defendants' demurrers without leave to amend, after defendants filed a motion and "Notice of Stay" under California Code of Civil Procedure Section 391.6. Therefore the unconstitutional violation of due process is within the exception to the doctrine of res judicata and appellant can collaterally attack the disclosure of her confidential medical records and is not barred by the doctrine of res judicata. Further, defendants' demurrers. sustained without leave to amend, on the basis of immunity and litigation privilege are ambiguous and does not constitute a judgment on the merits and a subsequent action is not barred by res judicata. Goddard v. Security Title Ins. and Guarantee Co. (1939) 14 Cal2d 47, 52 Robinson v. Howard (1855) 5 Cal429.

Since the courts lacked jurisdiction, failure to litigate in the prior action is not a bar to litigation in the present action.

In the underlying case these issues were not litigated , nor was there a final decision supported by a valid order on the causes of action, therein alleged. Case No. 078100 was brought against these herein named respondents for their illegal conduct in the disclosure of confidential medical records, absent a valid order, and collateral estoppel is only available as a defense if an issue decided in the prior case is identical to the one now presented. Stolz v. Bank of America (1993) 15 CA 4th 217, 19 C2d 19.

The prior action did not involve the same causes of action nor was the issue of jurisdiction and denial of a fair trial under 42 USC 1983 litigated.

Here, as in Mata v. City of Los Angeles, 20 CA 4th 141, 24 CR2d 314, (1993) the issues requiring resolution is whether Appellant's claims pursuant to 42 USC 1983 are

barred by the claim preclusion (res judicata) or whether the doctrine of issue preclusion (collateral estoppel) bars appellant from litigating her 1983 action. As the court held in Mata: "To be the same controversy there must be a nucleus of facts on which only one claim is allowed ." In California, if the second suit is on a different cause of action, as where there are . . .separate and distinct torts . . . there is no merger.

When a plaintiff is unable to rely on certain theories or seek certain remedies or relief in the first action because of limitations of the Court's subject matter jurisdiction or other restrictions of their authority, and the plaintiff desires, in the second action to rely on that theory or to seek that remedy or relief, the former case cannot act as a bar. Branson v. Sun Diamond Growers (1994) 24 Ca 4th 327, 344, 29 CR2d 314,

Res judicata does not apply to new rights acquired pending action which might have been, but which were not required to be litigated. Mihojevich v. Harrod (1963) 214 CA2d 360, 29 CR440.

The violation of each primary right gives rise to a separate cause of action. California Law Review, Vol. 40 p. 416 (1952). The California Supreme Court early declared its allegiance to the primary right theory, Hutchinson v. Ainsworth 73 Cal 452, 15 Pac 82 (1887); Wulfjen v. Dalton 24 C2d 891, 151 P2d 846 (1944).

There is a limit to the application of ordinary res judicata in California. In Greenfield v. Mather 32 Cal2d 23, 194 P2d 1 (1948), it was held that ordinary res judicata would not be applied so as to defeat the ends of justice. It has been suggested that in case of hardship the court should allow reopening of the earlier judgment, instead of making an exception to res judicata. Comment, 65 Harv. L. Review 818 (1952).

In reaching its decision , the court has relied exclusively on its June 18, 1996 unpublished opinion, Gates

v. Billon, et al. (1996) 2d Civ B091098 App the basis of which was the trial court's judgment filed on December 6, 1994, App .

On its face, the trial court "Judgment on Special Verdict" found only as to , 1) Question No. 1: Was the improper administration of Kenalog 40 on August 6, 1992 a cause of injury to the plaintiff? and 2) Question No. 3: Did the actions of defendant Elena Martinho. M.D., on August 30, 1993, constitute abandonment of plaintiff?

The court's judgment in Case No. 074413, on its face, does not support that the causes of action in that case were the same causes of action as in the instant case, Case No. 078100. Also there is no evidence that the judgment, on its face, supports that all defendants/respondents in Case No. 074413 (BO9108) and Case No. 078100 (B101415) are the same defendants/respondents, App.159-160.

The opinion position is that res judicata and collateral estoppel apply to the instant case. Appellant's position is that California Code of Civil Procedure section 1911 provides, "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been adjudged, or which was actually and necessarily included therein or necessary thereto." The issues presented in appellant's appeal were not fully litigated , nor was appellant given a full and fair review before the court ruled that res judicata and collateral estoppel applied. Collateral estoppel does not apply when the party against whom it is asserted did not have a "full and fair opportunity" to present the case. Kremer v. Chemical Constr. 456 U.S. 461, 480-481, 102 S. Ct. 1883, 1896-98, 72 L.Ed.2d 262 (1982; Allen v. McCurry, 449 U.S. 90, 95, 101 S. Ct. 411, 415, 66 L.Ed 308 (1980).

The appellate opinions failed to state a rule of law or cite authority to support its opinions that the lower court retained jurisdiction in Case No. 74413 (B091098) in the face of a mandatory stay, pursuant to CCP 916. In Hayworth

v. City of Oakland 129 Cal App3d at 727, 181 Cal Rptr 214, the court held:" the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon matters embraced therein or affected thereby, including enforcement of the judgment or order, CCP section 916. This rule is applicable in proceedings on a writ of mandate. " The Court of Appeal relying on the trial court's integrity failed to issue a "STAY" as requested, App 58-66. Resulting in the unconstitutional disclosure of confidential medical records.

Under the Supreme Court ruling in Clemente v. State of California (1985) 40 Cal3d 202, 211,219 Cal Rptr 445, absent a rule or authority in the prior opinion it cannot be considered law of the case and this court on review can decide:

1) The former opinion on Case No. CV 074413 is erroneous:
2) The court of appeal had jurisdiction of the subject matter addressed in Appellant's writ filed on June 17, 1994;
3) The lower court's July 6, 1994 order was issued in the clear absence of all jurisdiction;
4) The July 6, 1994 trial court order is invalid;
5) The July 6, 1994 and October 4, 1994 Referee's Statement of Decisions are not supported by trial court orders.
6) The trial court erred in denying appellant a fair opportunity to amend her complaint.

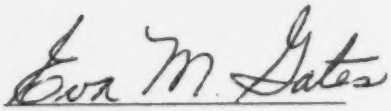
## CONCLUSION

For the foregoing reasons, if action, or inaction of the lower courts infringe upon the constitutional rights of a single citizen it is the concern of all citizens. Petitioner respectfully prays that her petition for certiorari be granted, that the judgments of the lower courts be reversed, that the

cause be remanded, and the courts be directed to grant a trial on the merits on the issues presented on appeal.

DATED: April 21, 1997

Respectfully submitted,



EVA M. GATES,
Petitioner pro per

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SECOND APPELLATE DISTRICT, DIVISION SIX
STATE OF CALIFORNIA

EVA M. GATES — Plaintiff and Appellant

v. — 2d Civil No. B101415

COUNTY OF SAN LUIS OBISPO, et al., — Defendants and Respondants

OPINION
(Filed October 29, 1996)

(Rick Brown and Kenneth Andreen, Judges Assigned)

Eva M. Gates appeals from the judgments entered after the trial court sustained without leave to amend demurrers filed by respondents County of San Luis Obispo (County), San Luis Obispo Superior Court (Superior Court), Hon. Barry Hammer, Christopher Helenius, Sharon F. Billon, M.D. Elana Martinho, M.D., Susie Morton, R.N., Marvin A. Bauer, Bauer, Harris & McEvoy, Southern California Physicians Insurance Exchange (SCPIE), and Compex Inc. (Compex). The trial court determined that the litigation privilege (Civil Code, Section 47, subd. (b)), and the doctrines of res Judicata and collateral estoppel barred each of the claims alleged by appellant. We affirm.

FACTS

On June 18, 1996, in an unpublished opinion , we affirmed a judgment entered against appellant in a medical malpractice action involving respondents Billon, Martinho and Morton. (Gates v. Billon (1996) 2d Civ. BO91098.) Among other things, we held that the trial court properly ordered disclosure to those respondents of appellant's

medical records. We also held that the trial court had jurisdiction to enter that order while appellant's petition for writ of mandate was pending before us. (See , e.g., Code of Civ. Proc., section 1072, 2017, subd. (a); Cal . Rules of Court, rule 56, subd.(c).) In this action , appellant claims that respondents violated her constitutional and statutory rights to privacy and inflicted emotional distress on her by participating in the disclosure of the very same medical records. \1

Discussion

The trial court properly sustained the demurrers of County, Superior Court, Hammer and Helenius (hereafter, the judicial respondants). All of the conduct which appellant alleges as the basis for their liability occurred while these respondents were acting in their judicial capacities. Accordingly, the judicial respondants are absolutely immune from liability. (Mireles v. Waco (1991) 502 U.S. 9, 11-12

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\1 Respondent Honorable Barry Hammer was the trial court judge in the prior lawsuit. Christopher Helenius was the referee appointed to resolve discovery disputes. Marvin Bauer and his law firm were counsel for respondents Billion , Martinho, and Morton. SCPIE was their insurer. Compex is the copying service retained to photocopy the medical records. County and Superior Court apparently were sued because they employed Judge Hammer and Helenius.

[116 L.Ed.2d 9, 112 S.Ct. 286,]; Howard v. Drakpkin (1990) 222 Cal App.3d 843, 851; Baar v. Tigerman (1983) 140 Cal. App.3d 979, 985.)

The demurrers of respondents Billon, Martinho, and Morton were also properly sustained without leave to amend. The question whether appellant's medical records were properly disclosed was fully litigated and finally decided against appellant in the prior action. Her claims against these respondents are therefore barred by the doctrine of res judicata. (California Coastal Comm'n. v. Superior Court (1989) 210 Cal. App.3d 1488, 1499; County of San Diego v. Hotz (1985) 168 Cal. App.3d 605, 609.)

For the same reasons, appellant's claims against the remaining respondents, other than the judicial respondents, are barred by the doctrine e of collateral estoppel. Appellant is collaterally estopped from relitigating the disclosure of her medical records, even against persons who were not parties to the prior action. (Takahashi v. Board of Education (1988) 202 Cal. App.3d 1464, 1477; Barker v. Hull (1987) 191 Cal. App.3d 221, 225.)

Moreover, the conduct of respondents (other than the judicial respondents) which forms the basis for appellant's claims occurred in connection with their defense against the malpractice action. Communications made by respondents to obtain and review the medical record are privileged because they were made in connection with the prior judicial proceeding, by litigants or their agents, to achieve the objects of the litigation. (Code Civ. Proc., Section 47, subd. (b); Silberg v. Anderson (1990) 50 Cal.3d 205, 212-214; Ribas v. Clark (1985) 38 Cal.3d 355.)

Appellant contends that the trial court erred in sustaining the demurrers to her claims under 42 United States Code section 1983, because federal law does not recognize California's litigation privilege. The argument is without merit. First, the judicial respondents are absolutely immune from liability under section 1983. (Mireles v.

Waco, supra, 502 U.S. at pp. 11-12.) Second, even if the litigation privilege does not protect the other respondents (see, Kimes v. Stone ( 9th Cir. 1996) 84 F.3d 1112, 1126), appellant's claims remain barred by res judicata and collateral estoppel. (Allen v. McCurry (1980) 449 U.S. 90, 103 [101 S.CT. 411, 66 L.Ed.2d 308]; Sanchez v. City of Santa Ana (9th Cir. 1990) 936 F.2d 1027, 1035, cert. denied (1991) 502 U.S. 957 {112 S.Ct. 417, 116 L.Ed.2d 437].)

The judgment is affirmed. Costs to respondents.

NOT TO BE PUBLISHED.

YEGAN, J

We concur:

STONE, P. J.

GILBERT, J

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN LUIS OBISPO

EVA M. GATES Plaintiff,

v. Case No. CV078100

THE COUNTY OF SAN
LUIS OBISPO, et al., Defendants.

ORDER SUSTAINING DEFENDANT'S DEMURRER TO PLAINTIFF'S COMPLAINT WITHOUT LEAVE TO AMEND

(Filed January 17, 1996)

Defendants , THE COUNTY OF SAN LUIS OBISPO AND THE COUNTY OF SAN LUIS OBISPO, SUPERIOR COURT'S Demurrer to plaintiff's complaint having come before the Court for hearing on December 29, 1995, with Judge Rick Brown presiding in Department CLM of the San Luis Obispo Superior Court, Eva M. Gates appearing in propria persona, Tom Bohl appearing for Judge Barry Hammer and Mr. Christopher Helenius, and James D. weakley appearing for The County of San Luis Obispo and The San Luis Obispo Superior Court, and the Court having considered the papers and arguments submitted in support of, and in opposition to, the Demurrer, and good cause appearing.

IT IS ORDERED THAT, the Demurrer is sustained without leave to amend on the grounds that the complaint does not state facts sufficient to constitute a cause of action, and on the grounds that plaintiff failed to plead with particularity against the defendants, THE COUNTY OF SAN LUIS OBISPO, and THE COUNTY OF SAN LUIS OBISPO, SUPERIOR COURT, and that under the applicable

substantive law there can be no liability on any cause of action alleged

DATED: 1-17-96

S/Rick Brown
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVE. M. GATES Plaintiff,

v. Case No. CV 078100

THE COUNTY OF SAN
LUIS OBISPO , et al., Defendants.

JUDGMENT OF DISMISSAL FOLLOWING SUSTAINING OF DEMURRER WITHOUT LEAVE TO AMEND

(Filed February 5, 1996)

Pursuant to the Court's Order dated January 17, 1996, sustaining defendant's Demurrer to Plaintiff's Complaint Without Leave to Amend.

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff's complaint is dismissed with prejudice as to defendants, COUNTY OF SAN LUIS OBISPO, and THE COUNTY OF SAN LUIS OBISPO, SUPERIOR COURT and that judgment be entered in favor of defendants;

IT IS FURTHER ORDERED , ADJUDGED AND DECREED that defendants shall recover from plaintiff defendants' recoverable costs of suit.

DATED 2-5-96

S/Rick Brown
JUDGE OF THE SUPERIOR COURT

March 5, 1996 HAND DELIVERED LETTER
(Stamped Received by Court Mar. 5, 1996)

Honorable Rick Brown
San Luis Obispo Superior Court
County Government Center
San Luis Obispo, CA 93408

Re: Judgments and Judgments of Dismissal Re:
Gates v. County of San Luis Obispo, et al.,
CV 078100

Dear Judge Brown:

I have filed this date the Notice of Entry of Order Sustaining, Defendants Judge Barry Hammer and Referee Christopher Helenius', Demurrer without Leave to Amend.

Neither the Court, nor defendants, have served notice of judgment nor notice of entry of judgment of dismissal on these two defendants.

In the event you are holding these documents on your desk, I request you immediately serve a copy on Plaintiff, in order to avoid your being the cause of plaintiff's failure to meet the deadline for filing the Notice of Appeal in this matter.

Thank you for your prompt attention to this matter.

Sincerely yours,

S/Eva M. Gates

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA. M. GATES, Plaintiff,

v. Case No. CV 078100

COUNTY OF SAN LUIS OBISPO, et. al., Defendants.

NOTICE OF ENTRY OF ORDER SUSTAINING DEFENDANTS JUDGE BARRY HAMMER AND REFEREE CHRISTOPHER HELENIUS' DEMURRER WITHOUT LEAVE TO AMEND

(Filed March 5, 1996)

---

(ORDER SUSTAINING DEMURRER WITHOUT LEAVE TO AMEND, Filed January 29, 1996, Attached as Exhibit "A")

---

PLEASE TAKE NOTICE that an Order Sustaining Defendants Judge BARRY HAMMER and Referee CHRISTOPHER HELENIUS' Demurrer Without Leave to Amend, in the form attached hereto as Exhibit "A" , was entered by the above-entitled court on January 29, 1996, with an erroneous Proof of Service dated January 3, 1996.

DATED: March 5, 1996 S/EVA M. GATES,
Plaintiff pro per.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN LUIS OBISPO

EVA M. GATES Plaintiff,

v. Case No. CV 078100

THE COUNTY OF SAN
LUIS OBISPO, et al., Defendants.

ORDER SUSTAINING DEMURRER
WITHOUT LEAVE TO AMEND

(filed January 29, 1996)

The demurrer of defendants, BARRY HAMMER and CHRISTOPHER HELENIUS, came before the Court for hearing on December 29, 1995, with the Honorable Rick Brown presiding. Plaintiff, EVA M. GATES, appeared in propria persona; James D. Weakley of Eldridge, Anderson & Weakley appeared for defendants, COUNTY OF SAN LUIS OBISPO and SAN LUIS OBISPO SUPERIOR COURT; and Thomas M. Bohl of Henderson, Wohlgemuth & Bohl appeared for defendant BARRY HAMMER and CHRISTOPHER HELENIUS.

Having considered the papers and arguments submitted in supporting and opposing points and authorities and the arguments of each party, and good cause appearing therefore,

IT IS ORDERED

That the demurrer of defendants, BARRY HAMMER and CHRISTOPHER HELENIUS be and hereby is, sustained without leave to amend on grounds that the Complaint does not state facts sufficient to constitute a cause of action; that under the applicable substantive law there

can be no liability on any cause of action alleged; that judgment be entered providing that plaintiff shall take nothing by way of the Complaint and that defendants shall recover costs of suit.

Dated: January 29, 1996

S/HON. RICK BROWN
Judge of the Superior Court

March 12, 1996 CERTIFIED MAIL, Z 153 511 007

Honorable Rick Brown
San Luis Obispo Superior Court
County Government Center
San Luis Obispo, CA 93408

Re: Gates v. County of San Luis Obispo, et. al.,
CV 078100

Dear Judge Brown:

I addressed you on March 5, 1996, regarding judgment of dismissal as to defendants JUDGE BARRY HAMMER and REFEREE CHRISTOPHER HELENIUS, and you have failed to respond.

As you are aware, defendants in this action; have not fulfilled the court's order to prepare and serve the attendant documents as required by statute and California Rules of Court.

Please date, sign and file with the court clerk the original JUDGMENT OF DISMISSAL FOLLOWING SUSTAINING OF DEMURRER WITHOUT LEAVE TO AMEND, which is attached and return the attached copy to me conformed by the court clerk. Due to the Court and defendants' long delay in this matter, I request you return the conformed copy to plaintiff immediately so she may file the NOTICE OF ENTRY OF JUDGMENT OF DISMISSAL and meet the deadline for appeal in this action.

Thank you for your prompt attention and cooperation in this matter, which will avoid another action in the court.

Sincerely ,

S/EVA M. GATES

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES, Plaintiff,

v. Case No. CV 078100

COUNTY OF SAN LUIS OBISPO, ET. AL., Defendants.

JUDGMENT OF DISMISSAL FOLLOWING SUSTAINING OF DEMURRER WITHOUT LEAVE TO AMEND

(Filed March 20, 1996)
(Kenneth Andreen, Judge Assigned)

Pursuant to the Court's Order dated January 29, 1996, sustaining defendant's Demurrer to Plaintiff's Complaint Without Leave to Amend.

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff's complaint is dismissed with prejudice as to defendants JUDGE BARRY HAMMER and REFEREE CHRISTOPHER HELENIUS, ESQ.

DATED: 3-20-96

S/ANDREEN
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT OF CALIFORNIA
SAN LUIS OBISPO COUNTY

EVA M. GATES Plaintiff,

v. Case No. CV 078100

COUNTY OF SAN LUIS
OBISPO, ET AL., Defendants,

NOTICE OF ENTRY OF JUDGMENT
OF DISMISSAL

(filed March 21, 1996)

TO DEFENDANTS, AND EACH OF THEM, AND TO THEIR ATTORNEYS OF RECORD:

YOU ARE HEARBY NOTIFIED that the Judgment of Dismissal Following Sustaining of Demurrer Without Leave to Amend as to defendants Judge BARRY HAMMER AND referee CHRISTOPHER HELENIUS was entered on March 20, 1996.

DATED: March 21, 1996

S/Eva M. Gates
Plaintiff, pro per

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES Plaintiff,

v. Case No. CV 078100

THE COUNTY OF SAN
LUIS OBISPO, et al., Defendants.

ORDER OF DISMISSAL IN FAVOR OF SOUTHERN CALIFORNIA PHYSICIANS INSURANCE EXCHANGE FOLLOWING THE SUSTAINING OF DEMURRER WITHOUT LEAVE TO AMEND
(Filed January 24, 1996)

On January 11, 1996, Defendant Southern California Physicians Insurance Exchange's ("SCPIE") demurrers to the Complaint came on regularly for hearing before the Hon. Kenneth Andreen presiding in Department CLM. Plaintiff appeared in pro se. Defendant SCPIE was represented by Ellen C. Waggoner of Latham & Watkins. After due consideration of the papers filed and oral argument, the Court took judicial notice of all matters requested by Defendants and Plaintiff and overruled Plaintiff's objections to Defendants' requests to take judicial notice. The Court also sustained SCPIE's demurrers without leave to amend.

In accordance with the Court's Order, IT IS ORDERED, ADJUDGED AND DECREED that:

Plaintiffs shall taken nothing from SCPIE, the Complaint shall be dismissed with prejudice and SCPIE shall recover from Plaintiff its costs of suit.

DATED: JAN 24 1996

S/Andreen
Judge of the Superior Court

PRESENTED BY:

LATHAM & WATKINS
Milton A. Miller
Ellen C. Waggoner

By: S/Ellen C. Waggoner
Attorneys for Defendant
SOUTHERN CALIFORNIA
PHYSICIANS INSURANCE EXCHANGE

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES Plaintiff,

v. Case No. CV 078100

THE COUNTY OF SAN
LUIS OBISPO, et al., Defendants.

ORDER SUSTAINING DEFENDANT COMPEX , INC.'S DEMURRER WITHOUT LEAVE TO AMEND AND JUDGMENT OF DISMISSAL

(filed January 31, 1996)

The demurrer of defendant COMPEX, INC. came on regularly for hearing on January 11, 1996, before the Honorable Kenneth Andreen, Judge Presiding, in the law and motion department of the San Luis Obispo superior court. Eva Gates appeared in Propria Persona as plaintiff; Lyn D. Tadlock of Long & Levit appeared on behalf of defendant Compex, Inc.; Marvin Bauer of Bauer, Harris & McEvoy appeared on behalf of defendants Marvin A. Bauer, Esq. and Bauer, Harris & McEvoy; Ellen Wagoner of Latham & Watkins appeared on behalf of defendant Southern California Physicians Insurance Exchange; Patricia K. Ramsey of Bonne, Bridges, Mueller, O'Keefe & Nichols appeared on behalf of defendants Sharon F. Billon, M.D., A Professional Corporation, Elana Martinho, M.D. and Susie Morton.

The Court having considered the moving papers, opposition and rebuttal papers, and the argument of plaintiff, and good cause appearing the court ruled that COMPEX,

INC.'S demurrer be sustained , without leave to amend, on the grounds that defendant COMPEX, INC.'S conduct is privileged pursuant to the litigation privilege of Civil Code section 47(b); that the plaintiff's second cause of action fails to state facts sufficient to constitute a cause of action for violation of a constitutional right to privacy against defendant COMPEX, INC.; that plaintiff's claims against COMPEX, INC. are barred by the doctrine of collateral estoppel.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the demurrer of COMPEX, INC. be sustained, without leave to amend, that this action be dismissed as to and judgment be entered in favor of defendant COMPEX, INC. and against plaintiff EVA M. GATES.

Dated 1-31-96

By S/Kenneth Andreen
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES Plaintiff,

v. Case No. CV 078100

THE COUNTY OF SAN
LUIS OBISPO, et al,, Defendants.

ORDER AND JUDGMENT OF DISMISSAL

(filed January 23, 1996)

The demurrer of defendants MARVIN A. BAUER, ESQ. and BAUER, HARRIS & McEVOY (hereinafter "BAUER") came on for hearing on January 11, 1996, in the civil law and motion department of the above-entitled court, before the Honorable Kenneth Andreen, judge presiding. appearing for defendants BAUER was Marvin A. Bauer of Bauer, Harris & McEvoy; appearing for SHARON F. BILLON, M.D., A professional Corporation, ELENA MARTINHO, M.D. and SUSIE MORTON was Patricia K. Ramsey of Bonne, Bridges, Mueller, O'Keefe & Nichols; appearing for defendant SOUTHERN CALIFORNIA PHYSICIANS INSURANCE EXCHANGE was Ellen Wagoner of Latham & Watkins; appearing for defendant COMPEX, INC. was Lyn Tadlock of Long & Levit; and appearing in propria persona was plaintiff EVA. M. GATES.

Upon due consideration of the moving, opposition and rebuttal papers and argument of plaintiff, the court ruled that BAUER'S demurrer be sustained, without leave to amend, on the grounds that plaintiff's complaint fails to state facts sufficient to constitute a cause of action against defendants BAUER, and on the further grounds that

BAUER'S conduct is privileged pursuant to the provisions of CIVIL CODE section 47(b), plaintiff's claims against BAUER are barred by the doctrine of collateral estoppel, and BAUER, as counsel for plaintiff's adversaries in the underlying action[San Luis Obispo Superior Court Case No. CV 074413, entitled "Gates v. Billon, et al.,") owed no duty to plaintiff, good cause appearing therefor,

IT IS HEREBY ORDERED , ADJUDGED AND DECREED that the demurrer of MARVIN A. BAUER, ESQ. and BAUER, HARRIS & McEVOY and against plaintiff EVA M. GATES, and that defendants MARVIN A. BAUER, ESQ. and BAUER, HARRIS & McEVOY be awarded their statutorily allowable costs pursuant to Code of Civil Procedure section 1032.

DATED: JAN 23, 1996

S/Kenneth Andreen
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES, Plaintiff,

v. Case No. CV 078100

THE COUNTY OF SAN LUIS OBISPO, et al., Defendants.

ORDER SUSTAINING DEFENDANTS DEMURRER TO PLAINTIFF'S COMPLAINT WITHOUT LEAVE TO AMEND

(Filed February 8, 1996)

The demurrer of defendants SHARON F. BILLON, M.D., a Professional Corporation, ELENA MARTINHO, M.D. and SUSIE MORTON came regularly on for hearing on January 11, 1996 with the Honorable Kenneth Andreen presiding. Eva M. Gates appeared in Propria Persona. Patricia K. Ramsey appeared on behalf of defendants Sharon F. Billon, M.D., a Professional Corporation, Elana Martinho, M.D. and Susie Morton. Marvin Bauer appeared on behalf of defendants Martin A. Bauer, ESQ. and Bauer, Harris & McEvoy. Ellen Wagoner appeared on behalf of defendant Southern California Physicians Insurance Exchange. Lyn W. Tadlock appeared on behalf of defendant Compex, Inc.

The Court having considered the papers and arguments submitted in support of and in opposition to the Demurrer, and good cause appearing,

IT IS ORDERED that ,the Demurrer is sustained without leave to amend on the grounds that the Complaint does not state facts sufficient to constitute a cause of action

against the defendants, Sharon F. Billon, a Professional Corporation, Elena Martinho, M.D. and Susie Morton.

SO ORDERED.

DATED: FEB 8, 1996

S/Andreen
THE HONORABLE KENNETH ANDREEN
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES Plaintiff,

v. Case No. CV 078100

THE COUNTY OF SAN LUIS OBISPO, et al., Defendants.

NOTICE OF ENTRY OF JUDGMENT /ORDER

(Filed February 14, 1996)

To the above named parties and to their attorneys of record:

You are hereby notified that judgment in the above entitled matter was entered on February 8, 1996

Executed Feb. 13, 1996

By: Patricia K. Ramsey
Attorney for Sharon F. Billon, M.D. et al.

SECOND APPELLATE DISTRICT , DIVISION SIX
STATE OF CALIFORNIA

EVA M. GATES — Plaintiff and Appellant,

v. — 2d Civil No. B101415

COUNTY OF SAN LUIS OBISPO, et al., — Defendants and Respondents

(Dated November 26, 1996)

THE COURT:

Petition for rehearing denied.

SECOND APPELLATE DISTRICT , DIVISION SIX
STATE OF CALIFORNIA

EVA M. GATES Plaintiff and Appellant,

v. 2d Civil No. B101415

COUNTY OF SAN
LUIS OBISPO, et al., Defendants and Respondents.

(Dated November 26, 1996)

THE COURT:

REQUEST FOR JUDICIAL NOTICE DENIED.

IN THE SUPREME COURT OF CALIFORNIA

EVA M. GATES Appellant,

v. S057689
(2nd App. Dist., Div. Six. No. B101415)

COUNTY OF SAN
LUIS OBISPO, et al., Respondents.

ORDER
(Filed January 22, 1997)

Appellant's petition for review DENIED.

S/GEORGE
Chief Justice

SECOND APPELLATE DISTRICT, DIVISION SIX
STATE OF CALIFORNIA

EVA M. GATES Plaintiff and Appellant,

v. 2d Civil No. B101415

COUNTY OF SAN LUIS OBISPO, et al., Defendants and Respondents.

REMITTITUR NOTICE
(Dated February 6, 1997)

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above-entitled cause on 10/29/96 is now final.

**AFFIRMED IN FULL**

Costs To Respondents.

Joseph A. Lane, Clerk

By: Mary J. Rosa
Deputy Clerk

SECOND APPELLATE DISTRICT, DIVISION SIX
STATE OF CALIFORNIA

EVA M. GATES — Plaintiff and Appellant,

v. — 2d Civil No. B101415

COUNTY OF SAN LUIS OBISPO, et al., — Defendants and Respondents

APPEAL FROM THE SUPERIOR COURT OF SAN LUIS OBISPO COUNTY, CASE NO. CV 078100

# REQUEST TO AUGMENT THE RECORD BY RESPONDENT SOUTHERN CALIFORNIA PHYSICIANS INSURANCE EXCHANGE

(Filed July 16, 1996)

Pursuant to California Rule of Court 12, Respondent Southern California Physicians Exchange requests to augment the record for this appeal by adding the decision of the Court of Appeal in Gates v. Billon 2d Civil No. B091098 (Cal. Ct. App. June 18, 1996), the medical malpractice action that spawned the present lawsuit. A copy of this decision is attached to this Request for Augmentation as Exhibit "A"

DATED July 16, 1996

Respectfully submitted,
LATHAM & WATKINS

By S/Milton A. Miller
Attorneys for "SCPIE"

SECOND APPELLATE DISTRICT , DIVISION SIX
STATE OF CALIFORNIA

EVA M. GATES, Plaintiff and Appellant,

v. 2d Civil No. B091098

SHARON F. BILLON, M.D.,
ET AL., Defendants and Respondents.

OPINION
(Filed June 18, 1996)

(Barry Hammer, Judge)

( Attached as Exhibit "A" to "REQUEST TO AUGMENT RECORD BY RESPONDENT SOUTHERN CALIFORNIA PHYSICIANS INSURANCE EXCHANGE)

Eva M. Gates appeals from the judgment entered in favor of respondents Sharon F. Billon, M.D., Elena Martinho, M.D., and Susie Morton in this medical malpractice action. Appellant's opening brief lists 43 purported errors by the trial court including discovery rulings, evidentiary rulings, the granting of a non-suit on one cause of action, the denial of her motion for new trial on another, and the award of costs to respondents pursuant to Code of Civil Procedure section 998.\1 After reviewing the record, we affirm.

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1 All statutory references are to this code unless otherwise stated.

## FACTS

Respondants treated appellant on two occasions for a small dermatological cyst on her back. On one occasion, respondent Martinho gave appellant an injection of Kenalog 40, instead of Kenalog 10. As a result, appellant received 20 milligram of Kenalog rather than 5 milligram. After appellant threatened to sue respondants over the mistake, respondents discontinued their treatment of appellant. Respondents admitted their error in using Kenalog 40. They contend at trial, and jury found , that the mistake caused no damage to appellant.

### Discovery Matters

Questions concerning the appointment of a discovery referee and the scope of discovery are addressed to the sound discretion of the trial court. We will not disturb its orders on such matters unless appellant demonstrates clear abuse. (Walker v. Superior Court (1991) 53 Cal.3d 257, 272; Machon v. Haddock (1961) 190 Cal.App.2d 151, 169.) She has failed to do so here.

The trial court had discretion to appoint a discovery referee because appellant filed frivolous pre-trial motions, refused to cooperate with discovery propounded to her, and propounded duplicative discovery requests to respondents. (Id., at p. 169) Appellant's request to inspect respondent's offices was properly denied because it was not reasonably calculated to lead to the discovery of admissible evidence. (Section 2017, subd. (a); National Steel products Co. v. Superior Court (1985) 164 Cal.App.3d 476, 492.) Appellant's request for a second deposition of respondent Billon was also properly denied. (Section 2025, subd. (t).)

Nor did the trial court and discovery referee abuse their discretion in ordering disclosure of appellant's medical records. Because appellant claimed to have suffered damage

to her immune system, a lack of stamina, and emotional distress, respondents were entitled to discover information concerning her treatment by other medical professionals, even for ailments unrelated to the cyst treated by respondents ( Section 2017, subd. (a).) The trial court had jurisdiction to order disclosure of these records while appellant's petition for writ of mandate was pending in this court because appellant did not request, and we did not issue a stay of proceedings in the trial court. (Section 1072; Cal. Rules of Court, rule 56, subd. (c).) Finally, the trial court had discretion to allow respondents to correct a typographical error and serve a subpoena on Dr. Segal after the discovery cut-off date had passed. (Section 2024, subd. (e).)

Because each of the challenged orders was within the trial court's sound discretion, none constituted an " [i]rregularity in the proceedings of the court, . . ." within the meaning of section 657, subdivision (1). Accordingly, the trial court properly denied appellant's motion for new trial to the extent that motion was based upon the challenged orders.

Evidentiary Rulings During Trial

The trial court permitted respondent's counsel to question appellant concerning certain entries in medical records prepared by other physicians . Appellant contends these questions were improper because she was not qualified to answer questions concerning the meaning of notes made by her doctors. Appellant also argues that questions concerning her participation in another lawsuit were irrelevant. None of these objections were made at trial. Accordingly, appellant has waived any argument of error relating to the admission of this evidence. (Taylor v. Union Pacific Railroad Co. (1976) 16 Cal.3d 893, 900.) Even if the argument had not been waived, appellant has failed to demonstrate that she suffered any prejudice as a result. (Pool v. City of Oakland (1986) 42 Cal.3d 1051, 1069.)

## Motion for Non-Suit

Appellant alleged that respondent Martinho negligently performed a cyst removal procedure on July 2, 1992. The trial court granted respondents' motion for non-suit on this claim because it found there was no evidence from which the jury could find that Martinho's conduct fell below the standard of care. This ruling was proper because appellant produced absolutely no evidence concerning the standard of care for the procedure at issue. (Carson v. Facilities Development Co. (1984) 36 Cal.3d 830. 839; Freeman v. Lind (1986) 181 Cal.App.3d 791, 799.) Appellant's motion for judgment notwithstanding the verdict raised the same issue and was properly denied for the same reason. (Shapiro v. Hu (1986) 188 Cal.App.3d 324, 334.)

## Motion for a New Trial

Appellant contends there was no conflict in the evidence concerning whether she was injured by the injection of Kenalog 40 and that the trial court therefore erred in denying her motion for new trial on that cause of action. We disagree. Respondents' expert witness testified that appellant suffered no significant or lasting injury as a result of the injection. In fact, they dismissed her claims of decreased resistance to infection, emotional distress, and deep pain as medically impossible. Under there circumstances, the trial court properly denied appellant's motion for new trial. (Sandco American , Inc. v. Notrica (1990) 216 Cal.App.3d 1495, 1506.) For the same reason we reject appellant's argument that the jury's verdict finding no damage is not supported by substantial evidence.

Award of Costs

Twelve days before trial, respondents made an offer to comprise pursuant to section 998. Appellant rejected the offer. After the jury returned its verdict in favor of respondents, the trial court awarded respondents their costs, including certain expert witness fees.

The order awarding costs was not an abuse of discretion. Section 998 allows an offer of compromise to be made "[n]ot less than 10 days prior to commencement of trial, . . ." and expressly grants the trial court discretion to award expert witness fees to prevailing defendants. (Section 998, subds. (b), (c).) In the absence of any evidence demonstrating that the costs awarded by the trial court were excessive of unreasonable, there was no abuse of discretion. (Rappenecker v. Sealance Service Inc. (1979) 93 Cal.App.3d 356, 266.)

Appellant's claim that the trial court ought to have denied respondents their costs as a sanction for bad faith discovery tactics is similarly without merit. There was no evidence to support a finding that respondents engaged in sanctionable conduct. (Section 128.5, 2023.)

For the reasons stated above, the judgment is affirmed. Costs to respondents.

NOT TO BE PUBLISHED.

We concur: Yegan, J

Stone, P.J.

Gilbert, J.

SECOND APPELLATE DISTRICT, DIVISION SIX
STATE OF CALIFORNIA

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|---|---|
| EVA M. GATES | Plaintiff/Appellant, |
| v. | 2d Civil No. B101415 |
| COUNTY OF SAN LUIS OBISPO, et al., | Defendants/Respondents. |

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APPEAL FROM THE SUPERIOR COURT OF SAN LUIS OBISPO COUNTY, CASE NO. CV 078100

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JOINDER IN REQUEST TO AUGMENT THE RECORD OF RESPONDENT, SOUTHERN CALIFORNIA PHYSICIANS INSURANCE EXCHANGE, BY RESPONDENTS, COUNTY OF SAN LUIS OBISPO, SAN LUIS OBISPO SUPERIOR COURT, BARRY HAMMER AND CHRISTOPHER HELENIUS

(Honorable Rick Brown and Honorable Kenneth Andreen Assigned)

(Filed July 24, 1996)

TO THE HONORABLE STEVEN STONE, PRESIDING JUSTICE; THE HONORABLE JUSTICES OF THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SIX; AND ALL PARTIES AND ATTORNEYS OF RECORD IN THIS PROCEEDING:

PLEASE TAKE NOTICE that defendants/respondents, COUNTY OF SAN LUIS OBISPO, SAN LUIS OBISPO SUPERIOR COURT, BARRY HAMMER and CHRISTOPHER HELENIUS, join in the Request to Augment the Record of respondent, SOUTHERN CALIFORNIA PHYSICIANS INSURANCE EXCHANGE.

Dated : July 19, 1996

HENDERSON, WOHLGEMUTH & BOHL

By : S/Andrews K. Whitman
Attorneys for COUNTY OF SAN LUIS OBISPO, SUPERIOR COURT, BARRY HAMMER and CHRISTOPHER HELENIUS

2 CIVIL B101415
San Luis Obispo No. 078100

IN THE COURT OF APPEAL OF CALIFORNIA,
SECOND APPELLATE DISTRICT , DIVISION SIX

| | |
|---|---|
| EVA M. GATES, | Plaintiff/Appellant, |
| v. | CIVIL NO. B101415 |
| COUNTY OF SAN LUIS OBISPO, et al., | Defendants/Respondents |

# OPPOSITION TO REQUEST TO AUGMENT RECORD BY RESPONDENT SOUTHERN CALIFORNIA PHYSICIANS INSURANCE EXCHANGE

(Filed July 24, 1996)

Appellant, EVA M. GATES, submits this opposition to Respondent SOUTHERN CALIFORNIA PHYSICIANS INSURANCE EXCHANGE'S request to augment the record for this appeal, on the following grounds:

1) The Court of Appeal Decision, with which "SCPIE" requests to augment the record is not a part of the original superior court file in this case. San Luis Obispo, CV No. 78100, 2nd B101415, as is required by California Rule of Court, Rule 12(a):

> ". . . a judge of the reviewing court, on such terms as are deemed proper, may order that any part of the original superior court file, including any paper or record on file or lodged with the superior court, be deemed filed, be transmitted to it, or that portions of the oral proceedings be transcribed, certified and transmitted to it. . . ". Emphasis Added .

2) The court of Appeal Opinion filed on Gates v. Sharon F. Billon, M.D., A Professional Corporation , et al., 2nd Civil BO91098 served on June 18, 1996, is not a final decision, has not been published, nor has a remittitur issued.

3) On July 1, 1996, Appellant filed Petition for Rehearing of the underlying case, San Luis Obispo No. CV 074413, 2nd BO91098, pursuant to CRC, Rule 27, filed with this Court and California Supreme Court.

4) On July 1, 1996, Appellant filed Appellant Requests Court Take Judicial Notice, (Evidence Code section 452, 453) with Exhibits "A"-"O" attached. This court denied this request notwithstanding it is required to take judicial notice when requested.

California Rules of Court , Rule 12 is specific regarding augmentation of any part of the original superior court file, therefore Respondent SOUTHERN CALIFORNIA PHYSICIAN INSURANCE EXCHANGE is requesting this court augment the record with a non-final,

unpublished decision, which is not a part of the original superior court file in Case No. CV 078100.

Appellant objects to augmentation with documents not specifically authorized under CRC, Rule 12.

With the foregoing in mind, Appellant requests the Court deny Respondents' request to augment the record.

DATED: July 24, 1996 S/ Eva M. Gates
Plaintiff and Appellant in pro per

CALIFORNIA SUPERIOR COURT
SAN LUIS OBISPO COUNTY

EVA M. GATES, Plaintiff,

v. Case No. CV078100

COUNTY OF SAN
LUIS OBISPO, et al., Defendants

APPELLANT REQUESTS COURT TAKE JUDICIAL NOTICE : LIST OF EXHIBITS

(Filed Concurrently With Opposition To Demurrers on December 22, 1995 and January 4, 1996.)

Motion for Order Quashing Deposition Subpoenas for Production of Business Records, or in the Alternative for a Protective Order . ..... Exhibit A

Statement of Decision filed May 24, 1994.....
Exhibit B

Plaintiff's Objection to Referee's Statement of Decision and Notice of Request for Hearing ..... Exhibit C

Plaintiff's Petition for Writ of Mandate or in the Alternative Writ of Prohibition, "Stay Requested", filed June 17, 1994. ..... Exhibit D

Order Re Referee's Statement of Decision, filed July 6, 1994. ..... Exhibit E

Court of Appeal Order, filed July 14, 1994..... Exhibit F

Plaintiff's Motion for Court's "In Camera" Review of Eva M. Gates' Medical Records Subject to 5 Deposition Subpoenas Served by Non-Party Sharon F. Billon, M.D.; and for Protective Order ..... Exhibit G

Minute Order, Judge Pro Tem, Diana L. Levison, August 18, 1994 ..... Exhibit H

Reporter's Transcript of Proceedings Before the Honorable Barry Hammer, Judge, August 29, 1994 ..... Exhibit I

Minute Order, Honorable Barry Hammer, Judge, August 29, 1994 ..... Exhibit J

Reporter's Transcript of Proceedings Before the Christopher A. Helenius, Referee, September 29, 1994 ..... Exhibit K

Plaintiff's Letters to Referee Helenius, dated September 1, 1994 and September 12, 1994, CC: Marvin A. Bauer ..... Exhibit L

Fifteen (15) Pages Faxed to Shane Kramer, Plaintiff's Attorney, on September 27, 1994, Re documents COMPEX, INC .relied on to copy and disclose Plaintiff's Medical Records and Information Prior to Court of Appeal Ruling on Writ and In-Camera Review by Superior Court ..... Exhibit M

Statement of Decision, filed October 4, 1994 ...Exhibit N

Plaintiff Eva M. Gates Objection to Referee's Statement of Decision Dated October 4, 1994 ..... Exhibit O

Notice of Deposition; Notice to Consumer served on HAROLD L. SEGAL, M.D., 1301-20th Street, Suite 440, Santa Monica, Ca 90404, on September 7,1994, by Defendants BAUER; BAUER, HARRIS & McEVOY; BILLON; MARTINHO; MORTON; "SCPIE" AND COMPEX, INC.... ..... Exhibit P

Notice of Deposition ; Notice to Consumer: AMENDED, served on Harold Segal, M.D., 140 Casa Street, San Luis Obispo, Ca 93401, on September 28, 1994 by Defendants BAUER; BAUER, HARRIS & McEVOY; BILLON; MARTINHO; MORTON; "SCPIE" and COMPEX, INC. ..... Exhibit Q

2 CIVIL B101415
San Luis Obispo No. 078100

COURT OF APPEAL, SECOND APPELLATE DISTRICT,
DIVISION SIX

| | |
|---|---|
| EVA M. GATES, | Plaintiff/Appellant, |
| v. | Case No. CV B101415 |
| COUNTY OF SAN LUIS OBISPO, et al., | Defendants/Respondents |

REQUEST THE COURT TAKE JUDICIAL NOTICE :
AND APPELLANT'S OBJECTION TO COURTS TAKING
JUDICIAL NOTICE OF OPINION PENDING
REVIEW IN SUPREME COURT
(Filed August 6, 1996)

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Appeal from the Superior Court of San Luis Obispo County Hon. Rick Brown, Assigned , December 29, 1995 Hon. Charles Piccuta, Judge Pro Tempore, January 31, 1995 Hon. Kenneth Andreen, Assigned, January 11, 1996,January 18, 1996, March 20, 1996 Case No. 78100

TO THE HONORABLE STEVEN STONE , PRESIDING JUDGE AND TO THE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX:

Appellant, EVA M. GATES, requests the Court take judicial notice of the following documents pursuant to Evidence Code section 450-459:

1. Petition for Review of Case No. 2d CV B091098 (SLO 074413) filed with this court and California Supreme Court in July 26, 1996;
2. Petition for Writ of Mandate or in the Alternative Writ of Prohibition, "STAY REQUESTED", filed June 17, 1994, BO84747, AA 528-559 (BO19098)
3. Plaintiff's Objection to Order Re Referee's Statement of Decision, filed July 1, 1994, AA 576-578, (BO91098);
4. Order Re Referee's Statement of Decision, filed July 6, 1994, AA 579 (Statement of Decision, AA 502, BO91098);
5. Court of Appeal Order, filed July 14, 1994, AA 628-629 (BO91098);
6. Proof of Service: Notice of Motion and Motion for Court's "In Camera" Review of Eva M. Gates' Medical Records, filed July 25, 1994, AA 630, (BO91098);
7. Minute Order, filed August 29, 1994, AA 701, (BO91098)
8. Appellant's September 1, 1994 Letter to Referee, AA 739
9. Appellant's September 12, 1994, Letter to Referee, AA785, (BO91098)

10. Notice of Deposition of Harold L. Segal, M.D. Santa Monica, California, served August 30, 1994, AA 740-741, (BO91098)
11. Notice of Deposition, AMENDED, To Harold D. Segal, M.D. 140 Casa St., San Luis Obispo, CA, served on September 27 , 1994, AA 843-846, (BO91098);
12. October 4, 1994 Letter From Referee to Appellant's Counsel, AA 877, (BO91098):
13. September 29, 1994 Hearing Transcript, AA 914-996, (BO91098);
14. Plaintiff Eva M. Gates Objections to Referee's Statement of Decision Dated October 4, 1994, filed October 19, 1994, AA 885-893,
15. Plaintiff's Objection to the Reference to Documents Produced for Trial by Dr. Segal, filed November 2, 1994, AA 1034-1-1034, (BO91098)
16. In Limine Motion to Request an in Camera Inspection of Medical Records, filed November 2, 1994, AA 1040-1041, (BO91098)
17. In Limine Motion to Limit Medical History Inquiry, Filed November 2, 1994, AA 142-143;
18. Court of Appeal Opinion, filed June 18, 1996, Appendix "P" of Appellant's Supreme Court Petition for Review, filed July 26, 1996

CALIFORNIA SUPREME COURT

EVA M. GATES Petitioner,

v. Case No. BO91098

SHARON F. BILLON, M.D.,
et al., Respondents,

(Request for Judicial Notice)
Petition for Review
(Filed with Court of Appeal August 6, 1996)

APPENDIX

| | |
|---|---|
| APPENDIX "A" | PETITION FOR WRIT OF MANDATE OR IN THE ALTERNATIVE WRIT OF PROHIBITION, FILED June 17, 1994 |
| APPENDIX "B" | PLAINTIFF'S OBJECTION TO ORDER RE REFEREE'S STATEMENT OF DECISION SERVED ON JUNE 24, 1994 |
| APPENDIX "C" | ORDER RE REFEREE'S STATEMENT OF DECISION , filed July 6, 1994, AA579; Statement, AA 502 |

| | |
|---|---|
| APPENDIX "D" | COURT OF APPEAL ORDER, July 14, 1994 |
| APPENDIX "E" | MINUTE ORDER, August 29, 1994 |
| APPENDIX "F" | APPELLANT'S SEPTEMBER 1, 1994 LETTER TO REFEREE |
| APPENDIX "G" | APPELLANT'S SEPTEMBER 12, 1994 LETTER TO REFEREE |
| APPENDIX "H" | NOTICE OF DEPOSITION TO HAROLD L. SEGAL, M.D. SANTA MONICA, CA, served August 30, 1994 |
| APPENDIX "I" | NOTICE OF DEPOSITION TO HAROLD D. SEGAL, M.D. 140 CASA ST. SAN LUIS OBISPO, CA, served September 27, 1994 |
| APPENDIX "J" | OCTOBER 4, 1994 LETTER FROM REFEREE TO APPELLANT'S COUNSEL |
| APPENDIX "K" | SEPTEMBER 29,1994 HEARING TRANSCRIPT |
| APPENDIX "L" | PLAINTIFF EVA M. GATES OBJECTIONS TO REFEREE'S STATEMENT OF DECISION DATED OCTOBER 4, 1994, filed October 19, 1994 |

APPENDIX "M" PLAINTIFF'S OBJECTION TO THE REFERENCE TO DOCUMENTS PRODUCED FOR TRIAL BY DR. SEGAL, filed November 2, 1994

APPENDIX "N" IN LIMINE MOTION TO REQUEST AN IN CAMERA INSPECTION OF MEDICAL RECORDS, filed November 2, 1994

APPENDIX "O" IN LIMINE MOTION TO LIMIT MEDICAL HISTORY INQUIRY, filed November 2, 1994

APPENDIX "P" COURT OF APPEAL OPINION, filed June 18, 1996

2 CIVIL B101415
San Luis Obispo No. 078100

COURT OF APPEAL, SECOND APPELLATE
DISTRICT, DIVISION SIX

EVA M. GATES — Plaintiff/Appellant

v. — Civil No. B101415

COUNTY OF SAN
LUIS OBISPO, et al., — Defendants/Respondents,

REQUEST COURT TAKE JUDICIAL NOTICE
RELATED TO PETITION FOR REHEARING
(Filed November 8, 1996, With Attached Judgment On
Special Verdict, Case No. CV 74413,
Filed on December 6, 1994)

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Appeal from the
Superior Court of San Luis Obispo County
Honorable Rick Brown, Assigned, Presiding:
December 29, 1995
Honorable Kenneth Andreen, Assigned, Presiding:
January 11, 1996, January 18, 1996, March 20, 1996

Case No. CV 078100

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TO THE HONORABLE STEVEN STONE, PRESIDING JUSTICE AND TO THE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX:

Appellant, EVA M. GATES, requests the Court take judicial notice of the following documents, due to Court's not accepting exhibits with Petition for Rehearing. Judicial notice is requested pursuant to Evidence Code section 450-459:

1. Trial Court "Judgment on Special Verdict" San Luis Obispo Superior Court Case No. CV 074413 (AA 1143-1145 2d CV BO91998) dated December 6, 1994, Exhibit "A".
2. Appellant's Request Court Take Judicial Notice of reasonable and necessary documents pertaining to Case 074413. Request filed on July 1, 1996 and denied by this Court on July 15, 1996.
3. In Case No. 078100 (B101415) Appellant Requested Court Take Judicial Notice of Opinion (BO91098) Pending Review in Supreme Court, on August 6, 1996. The Court granted judicial notice; and denied Appellant's objection on August 26, 1996.

The courts failed to take judicial notice of these documents, subsequent to granting the request and prior to issuing Opinion.

## MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF REQUEST

This Court is required to take judicial notice of the above-listed documents on request for judicial notice under Evidence Code section 453, which provides: "The trial court

shall take judicial notice of any matter specified in Section 452 if a party requests it...

Evidence Code section 452 (d)(1) provides : that the court shall take judicial notice of "Records of (1) any court of this state...Evidence Code_section 459 provides: The reviewing court shall take judicial notice of any matter specified in Section 452.

In California, records of a court come within the provisions of Evidence Code section 452(d)(1), as a permissive or discretionary matters that may be judicially noticed by the trial court. When a request to take judicial notice of such record is made, Evidence Code section 453, then makes it conditionally mandatory that the court do if sufficient notice is given to the adverse party and if the court is furnished with sufficient information to enable it to take judicial notice of the matter. People v. Maxwell (1978) 78 CA3d 124, 144 CR 95.

This Court is required to take judicial notice of its own orders of July 15, 1996 and August 26, 1996 and the trial court's judgment upon which this Court has based its Opinions, Gates v. Sharon F. Billon, M.D., A Professional Corporation, et al, (074413, B091098).

Appellant request the Court take judicial notice of the face of the Judgment based on the courts' and Respondents insistence that both case 074413 and 078100 are one and the same and against the same parties and the facts stated below:

1. There is no evidence that the trial court properly ordered disclosure of Appellant's medical records in Case No. 074413 and no such ruling for the Court of Appeal to uphold.

2. There is no evidence that the trial court had jurisdiction to enter its July 6, 1994 order to disclose medical

records while Appellant's petition for writ of mandate to limit or prohibit disclosure of medical records was pending before the Court of Appeal. There is no ruling in the judgment to support the Court of Appeal affirming such disclosure.

3. There is no evidence that the judgment on its face, supports that defendants/respondents in Case No. 074413 (B101415) and Case No. 078100 (B091098) are the same defendant/respondents.

4. The trial court's " Judgment on Special Verdict " found only as to Question No.1: Was the improper administration of Kenalog 40 on August 6, 1992, a cause of injury to the plaintiff?, and as to Question No. 3: Did the actions of defendant Elana Martinho, M.D., on August 30, 1993, constitute abandonment of plaintiff?

The court's judgment in Case No. 074413, on its face, does not support that the cause of action in that case were the same causes of action as in Case no. 078100.

This Court has refused to address appellant's due process claims violated by respondents, the trial court and this Court in the underlying case and the instant case. It was error and violation of due process by this court in denying appellant's right of judicial notice of documents vital to the underlying case, which were filed with this court on July 1, 1996, and if judicially noticed would have clarified the true facts for the court in the underlying case. Further it was error and violation of due process by this court's denying judicial notice of appellant's request and cannot be disputed as a due process violation after this Court had granted judicial notice on August 26, 1996.

On its face , the trial court's judgment does not prove that it had jurisdiction to disclose appellant's medical records, nor that the records were not disclosed in violation of due process, as is made clear from the documents

submitted to the court for judicial notice, especially the documents listed below:

1. The March 1993 admission of Dr. Billion that she disclosed her chart, compiled by she and Dr. Martinho, to SOUTHERN CALIFORNIA PHYSICIANS INSURANCE EXCHANGE and its agents before a lawsuit was filed, without authorization.
2. The trial court's July 6, 1994 order issued in the clear absence of all jurisdiction,
3. The Court of Appeal's order of July 14, 1994 issued either in the clear absence of all jurisdiction, or with jurisdiction, which divested the trial court's jurisdiction of the subject matter.
4. The fraudulent Subpoena causing illegal disclosure of Dr. Segal's chart information on Appellant.
5. Appellant's Motion for in-camera review of medical records which the court failed to timely review, in violation of due process.

California Code of Civil Procedure section 1911 provides:

> That only is deemed to have been adjudged in a former judgment which appears upon its face to have been adjudged , or which was actually and necessarily included therein or necessary thereto.

This Court has based both the June 18, 1996 and October 29, 1996 Opinions on the trial court's judgment therefore this Court must take judicial notice of the trial court judgment and errors in due process and rulings

Dated November 8, 1996 S/EVA M. GATES

BAUER, HARRIS & McEVOY
Marvin A. Bauer, Bar No. 38517
Attorneys At Law
Post Office Box 21007
Santa Barbara, California 93121
Telephone: (805) 965-0043

Attorneys for Defendants
SHARON F. BILLON, M.D.,
A Professional Corporation,
ELANA MARTINHO, M.D.,
and SUSIE MORTON

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN LUIS OBISPO

EVA M. GATES, Plaintiff,

v. CASE NO. CV 74413

SHARON F. BILLON, M.D.
A PROFESSIONAL CORP.
ELANA MARTINHO, M.D.,
and SUSIE MORTON, Defendants,

JUDGMENT ON SPECIAL VERDICT
(Filed on December 6, 1994)

This action came on regularly for trial on October 31, 1994 , in Department II in the Superior Court of the State of California, for the County of San Luis Obispo, the Honorable Barry Hammer, judge presiding; the plaintiff appearing by

attorney Shane Kramer ; and, the defendants appearing by attorney Marvin A. Bauer.

A jury of twelve persons was regularly impaneled and sworn. Witnesses were sworn and testified, After hearing the evidence and arguments if counsel, the jury was duly instructed by the court, and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its first verdict consisting of the special issues submitted to the jury and the answers given thereto by the jury, which said verdict was as follows:

We, the jury in the above entitled action, find the following special verdict on the issues submitted to us:

Question No. 1: Was the improper administration of Kenalog 40 on August 6, 1992, a cause of injury to the plaintiff?

Answer "yes " or "no."

Answer: No.

If you answer Question No. 1 "no" do not answer Question No. 2, but answer Question No. 3.

Question No. 2: What, if any, do you find to be the total amount of damages suffered by the plaintiff as a result of the Kenalog injection on August 6, 1992?

Answer "yes" or "no."

Answer :_____.

Please answer Question No. 3.

Question No. 3: Did the actions of defendant Elana Martinho, M.D., on August 30, 1993, constitute an abandonment of plaintiff?

Answer "yes" or "no."

Answer: No.

If you answered "no" to Question 3, date and sign this verdict. If you answered "yes" to Question No. 3, date

and sign this verdict. If you answered "yes" to Question No. 3, please answer Question No. 4.

Question No. 4: Did the actions of defendant Elena Martinho, M.D., on August 30, 1993, cause injury to plaintiff?

Answer "yes" or "no."

Answer: ___.

If you answered "no" to question 4, then answer Question No. 5.

Question No. 5: What, if any, do you find to be the total amount of damages suffered by the plaintiff as a result of the actions of defendant Elena Martinho, M.D., on August 30, 1993?

Answer: $_____

Dated: 11/15/94

JOHN D. FETYKO
FOREPERSON

Based upon the jury trial in this matter:

IT IS ORDERED, ADJUDGED AND DECREED as follows:

That judgment be entered in favor of defendants SHARON F. BILLON, M.D., A PROFESSIONAL CORPORATION, ELENA MARTINHO, M.D., and SUSIE MORTON, and against plaintiff EVA GATES, together with costs and disbursements recoverable by statute and/or in the discretion of the court.

Dated: December 6, 1994

S/ BARRY HAMMER
JUDGE OF THE SUPERIOR COURT

SECOND APPELLATE DISTRICT, DIVISION SIX
STATE OF CALIFORNIA

EVA M. GATES — Plaintiff and Appellant,

v. — 2d Civil No. B101415

COUNTY OF SAN LUIS OBISPO, et al., — Defendants and Respondants

ORDER
(Filed August 1, 1996)

THE COURT:

Respondent's motion to augment the record shall be considered as a request to take judicial notice and is hereby GRANTED.

S/YEGAN
Acting Presiding Justice

SECOND APPELLATE DISTRICT , DIVISION SIX
STATE OF CALIFORNIA

EVA M. GATES — Plaintiff and Appellant,

v. — 2d Civil No. B10415

COUNTY OF SAN LUIS OBISPO, et al., — Defendants and Respondents

ORDER
(Filed August 26, 1996)

THE COURT:

Appellant's motion to take judicial notice is GRANTED..

Appellant's objection to this court's granting respondents' motion to take judicial notice of this courts opinion in B091098 on August 1, 1996 is DENIED.

S/STONE
PRESIDING JUSTICE

2 CIVIL B084747
San Luis Obispo No. 074413

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT DIVISION SIX

EVA M. GATES. Petitioner,

v. 2d Civil B 084747

SUPERIOR COURT SAN LUIS OBISPO COUNTY, CALIFORNIA. Respondent.

SHARON F. BILLON, M.D., et al.,

Real Parties in Interest.

PETITION FOR WRIT OF MANDATE OR IN THE ALTERNATIVE WRIT OF PROHIBITION:

"STAY REQUESTED"

(Filed June 17, 1994)

EVA M. GATES
140 South Dolliver Street No. 69
Pismo Beach, California 93449
Telephone: (805) 773-4251

Petitioner,
appearing in propria persona.

# EXHIBIT LIST TO WRIT
(Filed June 17, 1994)


| | | Page |
|---|---|---|
| EXHIBIT A | A true and correct copy of "Ruling on Objection to Referee's Statement of Decision" and Denial of Request for Hearing, filed June 9, 1994 ..... | 1 |
| EXHIBIT B | A true and correct copy of Referee's Statement of Decision, filed May 24, 1994 ..... | 4 |
| EXHIBIT C | A true and correct copy of "Plaintiff's Objection to Referee's Statement of Decision and Notice of Request for Hearing " ..... | 18 |
| EXHIBIT D | A true and correct copy of plaintiff's "Notice of Motion and Motion for Order Quashing Deposition Subpoenas for protection of Business Records; or in the Alternative for a Protective Order with supporting documents and Exhibits "A"-"F", filed April 19, 1994 ..... | 26 |
| | A true and correct copy of Defendant' Opposition to Motion Quashing Deposition Subpoenas for Production of Business Records or for Protective Order, with supporting documents and Exhibits A-B, filed May 6, 1994. ..... | 46 |

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A true and correct copy of "Plaintiff's Reply Memorandum in Support of Motion for Order Quashing Five Deposition Subpoenas for Production of Business Records or in the alternative for a Protective Order, filed May 9, 1994 ..... 62

EXHIBIT E A true and correct copy of defendant's "Notice of Motion for and Motion for Protective Order and Appointment of Discovery Referee; with supporting documents and Exhibit A-I, filed on April 22, 1994,(on shortened time pursuant to order of Court, no Reply allowed.) ..... 96

A true and correct copy of "Plaintiff's Memorandum of Points and Authorities in Opposition to Motion for Protective Order and Appointment of Referee, and supporting documents and Exhibits A-I, filed on April 29, 1994 ..... 165

A true and correct copy of "Order", court's ruling Assigning a Referee. filed May 10, 1994 ..... 218

EXHIBIT F A true and correct copy of "Notice of Hearing", Referee , filed May 11, 1994 ..... 220

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EXHIBIT G A true copy of "Superior Court of California, County of San Luis Obispo , Joint At-Issue Memorandum, filed May 2, 1994 * Notice of Status Conf./Trial Setting Conf. ..... 223, 226

EXHIBIT H A true and correct copy of Notice of Motion and Motion to Set Aside Defendant's Stipulation and Reconsideration of Court's Rulings of March 22, 1994, filed April 15, 1994. ..... 227

A true and correct copy of defendant's Opposition to Motion to set aside Defendant's Stipulation and Reconsideration of Court' Rulings of March 22, 1994 filed May 19, 1994 ..... 263

A true and correct copy of plaintiff's Reply Memorandum in Support of Motion to Set Aside Defendants' Stipulation and Reconsideration of Court's Rulings of March 22, 1994 .....269

A true and correct copy of Court's "Order" filed on March 6, 1994. ..... 594

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EXHIBIT I — A true and correct copy of Exparte Application for Order Shortening Time for Hearing on a Motion for Protective Order and Appointment of Discovery Referee, filed April 20, 1994. ..... 314

A true and correct copy of plaintiff's "Objection to Setting Motions on Shortened Time For Protective Order and Appointment of Discovery Referee. ..... 320

A true and correct copy of the Court's Order Shortening Time for Hearing Motion for Protective Order and Appointment of Discovery Referee. ..... 372

EXHIBIT J — A true and correct copy of defendants' "Stipulation of Facts" served on April 5, 1994. ..... 374

EXHIBIT K — A true and correct copy of the Court's Order (1) Motion to Compel Inspection; (2) Motion to Compel Answers to Interrogatories. ..... 377

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A true and correct copy of Plaintiff's Objection to Court's Ruling and Request Reconsideration Re: Motion or Order Compelling Inspection of Specified Areas of "CORPORATION' Medical Facilities; and Objection to Rulings Exparte Without Court Hearing Argument Re: "Corporation " Liability. ...379

EXHIBIT L A true and correct copy of plaintiff's "Notice of Motion and Motion to Compel Inspection of Specified Areas of "Corporation" Medical Facilities and for Award of Sanctions, supporting documents, Exhibit A-L, filed on March 4, 1994. ..... 386

A true and correct copy of defendants' "Declaration of Marvin A. Bauer and Memorandum of Points and Authorities in Opposition to Plaintiff's Motion to Compel inspection of Specified Areas of "Corporation" Medical Facilities/ Sanctions; Request for Sanctions, filed March 15, 1994. ..... 449

A true and correct copy of "Plaintiff's Reply Memorandum of Points and Authorities in Support of Motion for Order Compelling Inspection of Specified Areas of "Corporation" Medical Facilities ; Award Sanctions, Exhibit A-L, filed March 18, 1994 .....458

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EXHIBIT M A true and correct copy of plaintiff's "Notice of Motion and Motion for Order Compelling Further Answers to Interrogatories and For Award Sanctions; supporting documents and Exhibits A-P, filed March 4, 1994. ..... 464

A true and correct copy of defendant's "Declaration of Marvin A. Bauer and Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Order Compelling Further Answers to Interrogatories/Sanctions; Request for Sanctions, filed March 15, 1995. ..... 568

A true and correct copy of "Plaintiff's Reply Memorandum of Points and Authorities in Support of Motion for Order Compelling Further Answers to Form Interrogatories; Award Sanctions , filed March 18, 1994. ..... 578

EXHIBIT N A true and correct copy of defendant Susie Morton's "Answer to Verified Complaint for Personal Injury", filed March 28, 1994. ..... 596

EXHIBIT O A true and correct copy of defendant Elena Martinho, M.D., "Answer to Verified Complaint for Personal Injury", filed on November 29, 1993. ... 602

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EXHIBIT P A true and correct copy of defendant Sharon F. Billon, M.D., A Professional Corporation's "Answer to Verified Complaint for Personal Injury", filed on January 4, 1994. ..... 612

EXHIBIT Q A true and correct copy of Request for Order Allowing Amendment to Complaint; Order, filed March 1, 1994. ..... 624

A true and correct copy of "Amendment to Complaint", adding Susie Marton, R.N. as Doe 1 filed March 1, 1994. ..... 626

A true and correct copy of " Verification, Amendment to Complaint", filed March 10, 1994. ..... 629

A true and correct copy of Plaintiff's Summons filed December 1, 1993 ..... 631

A true and correct copy of Plaintiff's Complaint , filed October 25, 1993 ..... 633

EXCERPT FROM BODY OF WRIT
REQUESTING "STAY"

. . . as of May 2, 1994, copy filed herewith as Exhibit "G", and incorporated herein by reference; and Arbitration Status Conference/Trial Setting Conference is set for July 22, 1994, copy attached herewith as Exhibit "G", and incorporated herein by reference. Petitioner is requesting an immediate "Stay " of trial court proceedings, for a ruling on this petition for writ, and request an immediate writ be issued to protect petitioner's constitutional right of privacy. Petitioner has diligently followed Fast Track scheduling and requests an expeditious ruling on this request for writ in order to meet the Fast Track requirements.

9. Respondent's acts in excess of their jurisdiction has damaged petitioner in the sum of $1274 in that petitioner has to pay the Referee $765 to review and hear the above entitled motions and $709 for preparation and filing of this petition.

WHEREFORE, petitioner prays,
That a writ issue under the seal of this Court commanding Respondent to vacate its order to disclose petitioner's medical history for the past ten (10) years, or limit the disclosure of medical history to only that related directly to the issues. For recovery of costs incurred in this proceeding and for such and other and further relief as the Court may deem proper, by way of writ of mandate or prohibition.

Dated: June 17, 1994

S/Eva M. Gates
Petitioner,
propria persona

PROOF OF SERVICE BY MAIL

PETITION FOR WRIT OF MANDATE OR IN THE ALTERNATIVE WRIT OF PROHIBITION; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION IN LIEU OF TRANSCRIPT; EXHIBITS A-Q; "STAY REQUESTED"

HONORABLE BARRY HAMMER
SUPERIOR COURT JUDGE
COUNTY GOVERNMENT CENTER
6050 MONTEREY STREET
SAN LUIS OBISPO, CA. 93408
(1 copy)

JOSEPH A. LANE, CLERK
SECOND APPELLATE DISTRICT
1280 SO. VICTORIA AVE. SUITE 201
VENTURA, CA. 93003
(Original & 4 copies)

MARVIN A. BAUER, #38517
BAUER, HARRIS & McEVOY
P.O. BOX 21007
SANTA BARBARA, CA 93408
(1 copy)

REFEREE: CHRISTOPHER A. HELENIUS, #71161
SMITH , HELENIUS 7 HAYES
P.O. BOX 1446
SAN LUIS OBISPO, CA 93406
(1 copy)

DATED June 17, 1994 S/MARGARET J. GARRIGAN

SUPPLEMENTAL
PROOF OF SERVICE BY PERSONAL DELIVERY

PETITION FOR WRIT OF MANDATE OR IN THE ALTERNATIVE WRIT OF PROHIBITION; SUPPORTING MEMORANDUM OF POINTS AND /AUTHORITIES; DECLARATION IN LIEU OF TRANSCRIPT; EXHIBITS A-Q; "STAY REQUESTED"

HONORABLE HARRY WOOLPERT
PRESIDING JUDGE SUPERIOR COURT
COUNTY GOVERNMENT CENTER
6050 MONTEREY STREET
SAN LUIS OBISPO, CA. 93408,
(1 copy)

Dated: June 21, 1994 S/DONALD B. GATES

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES Plaintiff,

v. Case no. CV 074413

SHARON F. BILLON, M.D.
A PROFESSIONAL CORPORATION
ELENA MARTINHO, M.D., et al., Defendants.

ORDER RE REFEREE'S STATEMENT OF DECISION

(Filed July 6, 1994)

Christopher Helenius, Esq., having been appointed as Discovery Referee by this court pursuant to Code of Civil Procedure section 639, and Mr. Helenius having conducted a hearing on May 16, 1994, on plaintiff's Motion for Order Quashing Deposition Subpoenas for Production of Business Records and defendant's Motion for Protective Order, having issued a Statement of Decision with respect to those motions on May 24, 1994, plaintiff having filed objections to the Statement of Decision, and this Court having considered said objections, and overruling said objections, and this Court having adopted the recommendation of Referee Christopher Helenius in its entirety, based on its review of the statement of decision and its review of the file,

IT IS HEREBY ORDERED that the Statement of Decision attached as Exhibit "A" be adopted in its entirety and that it be made the order of the Court, and that plaintiff pays one-half (1\2) the costs , namely $765.00, within thirty (30) days, and that defendants pay one-half (1\2) of the referee's costs, namely $765.00, within thirty (30) days.

Dated: July 6, 1994 S/Barry Hammer

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES Plaintiff,

v. Case No. CV 074413

SHARON F. BILLON, M.D.
et al., Defendants

STATEMENT OF DECISION
(filed May 24, 1994)

(Attached as Exhibit "A" to Court Order Filed July 6, 1994)

On May 16, 1994, a hearing on Plaintiff's Notice of Motion and Motion for Quashing Deposition Subpoenas for Production of Business Records; or in the Alternative for a Protective Order and hearing on Defendants' Motion for Protective Order, both of which originally been set for hearing in the Superior Court on May 5, 1994, was heard by Referee, Christopher A. Helenius, Esq., of Smith , Helenius & Hayes, A Law Corporation. The hearing took place at 1880 Santa Barbara Street, San Luis Obispo, California. Present were plaintiff, EVA M. GATES, pro se, and Marvin A. Bauer, Esq., as attorney for all defendants.

The referee has read and considered Plaintiff's Notice of Motion and Motion for Order Quashing Deposition Subpoenas for Production of Business Records; or in the Alternative for a Protective Order; Memorandum of Points & Authorities in Support of Motion for Order Quashing Deposition Subpoenas for Production of Business Records; Declaration of Eva M. Gates in support of Motion for Order Quashing Deposition Subpoenas for Production of Business Records; Opposition to Motion for Order Quashing

Deposition Subpoenas for Production of Business Records or for Protective Order; Declaration of Marvin A. Bauer, Esq.; Plaintiff's Reply Memorandum in Support of Motion for Order Quashing Five Deposition Subpoenas for Production of Business Records or for Protective Order; Plaintiff's Exhibit List for Order Quashing Deposition Subpoenas for Production of Business Records of for Protective Order. The Referee has also reviewed and considered Defendants' Notice of Motion and Motion for Protective Order; Plaintiff's Memorandum of Points & Authorities in Opposition to Motion for Protective Order; Plaintiff's Exhibit List in Opposition to Motion for Protective Order. The referee was not provided with Defendants' Exhibits in Support of their Motion for Protective Order and the Referee went to the Superior Court to obtain the same. The court's file failed to contain the exhibits. These exhibits have subsequently been provided by defense counsel and reviewed and considered. The referee has also considered the Order of the Superior Court by the Honorable Barry Hammer, filed in this action on May 10, 1994. Said Order provides for the reference and outlines the authority of the referee.

The referee, having heard oral argument and read and considered the above documentation, makes the following findings and recommendations:

## PLAINTIFF'S MOTION FOR ORDER QUASHING DEPOSITION SUBPOENAS FOR PRODUCTION OF BUSINESS RECORDS OR FOR PROTECTING ORDER

Plaintiff, EVA M. GATES, seeks to quash deposition subpoenas by way of written motion and sets forth five separate locations for which she seeks an order quashing the subpoenas. These locations were listed as Med Stop of Pismo Beach, Drs. Ralston, Fishman and Holzhauer of San Luis Obispo, and Fair Oaks Pharmacy in Grover Beach.

During oral argument , Plaintiff withdrew her request with respect to Med Stop in Pismo Beach. She continues to press her request with respect to the other four providers.

Plaintiff's objection concern a lack of notice of these subpoenas to all defendants, the physician-patient privilege, and the California Constitution , Article I, Section 1 - Right of Privacy. She cites many cases appropriate to discussion of this issue. She seeks an award of sanctions and acknowledges sanctions are not indicated in the event that substantial justification exists for having pressed or defended these discovery interests.

During oral argument, Plaintiff conceded that she was making damage claims for a depressed or compromised immune system, systemic problems and fatigue. Plaintiff's Reply Memorandum likewise states " this case involves . . . (7) . . .loss of stamina and fatigue, suffering, and mental and emotional distress." Later on in that paperwork she references increases susceptibility to infection. She adds as further points in her Reply Memorandum that the records Defendants' seek are not relevant because Plaintiff does not seek damages for problems occurring before the defendants' treatment of her.

The defendants' position is that Plaintiff has tendered a general health injury claim and they must be given an opportunity to discover Plaintiff's medical history for the past fifteen years in order to address the issues raised by the tendered claims.

Dealing with the notice issue first, the Referee notes this argument lacks merit. First , Code of Civil Procedure section 2020(b) allows attorneys to issue subpoenas on their clients behalf. Second, the plaintiff has cited no authority for her position . Third, she lacks standing to complain. The referee therefore recommends that the motion of plaintiff be denied upon this particular ground. That leaves us to consider her two substantive grounds. Evidence Code section 994 provides for a physician/patient privilege. In re

Lifschutz (1970) 2 Cal.3d 415, teaches us that the purpose of the physician/patient privilege is to avoid embarrassment and humiliation. (Id. at Page 434.) Evidence Code section 996(a) and In re Lifschutz makes it equally clear that a patient-litigant exception applies when the patient tenders the issue of her health condition in litigation. Communications relevant to that issue are not privileged for trial or discovery purposes. In re Lifschutz also makes it quite clear that the patient has the burden of showing that a given confidential communication is not directly relevant to the issue she has tendered into court. (Id. at pages 436-437.) Plaintiff's moving and reply paperwork, together with her oral argument at hearing, fail to carry her burden in this regard. Plaintiff has acknowledged a general medical injury claim, as earlier noted in this Statement of Decision. Plaintiff's motion would be well taken had she delimited her claim to the injuries immediately and directly caused by the injection and /or injectate. She has chosen not to so limit her claim. This is her right and her decision. She cannot, on the other hand, seek to preclude the defense from meeting these issues. Patterson v. Superior Court (1983) 147 Cal.App.3d 927 is controlling. In that action, Plaintiffs' decedent hung himself. The plaintiffs sued for their son's wrongful death. The defendant, a psychiatric treatment center, sought decedent's prior psychiatric records. Plaintiffs moved for a protective order and the Court of Appeal determined that the defendants should not be required to defend themselves based solely upon what they knew while Plaintiffs' decedent was under their care alone. (Id at Page 931) The nature of the Patterson lawsuit called for full inquiry into the plaintiffs' decedent's history of medical and psychological problems in order to determine how to defend the action, so as to avoid defending with partial knowledge. (Id.) The logic of the Patterson decision applies to the instant matter

with equal force and Plaintiff's Motion for an Order Quashing Deposition Subpoenas for Production of Business Records or for a Protective Order should be denied. The referee recommends that the subpoenas be limited to Plaintiff's medical condition for the past ten years.

DEFENDANTS MOTION FOR PROTECTIVE ORDER

A. Plaintiff's request to produce Documents and Tangible things at Deposition of Sharon F. Billon, M.D.

Defendant SHARON F. BILLON, M.D. has objected to Plaintiff's demand for production of documents at deposition. Specifically, she objects to categories 1, 2, 4, 5, 13, 22, 23, and 24 on the basis of attorney/client and work-product privileges. The referee recommends that the court issue a protective order with respect to Items 1, 13, 22, 23 and 24. The referee also recommends that a protective order issue with respect to Items 2 and 4, except insofar as those requests seek written statements or reports made by Plaintiff or her family members in the possession of defendant SHARON F. BILLON, M.D., or anyone under her control. The referee recommends that a protective order not issue with respect to Item 5.

Defendant SHARON F. BILLON, M.D. has objected to Items 6, 7, 8, 9, 11 and 12 on the basis of relevancy . The referee recommends that the objections be sustained as to all said requests. The only relevance of these items would concern whether or not the defendant corporation is in good standing. This information is equally available to the plaintiff through government sources and is burdensome. The plaintiff has not established any basis by which said documentation would be relevant in this action.

Defendant SHARON F. BILLON, M.D. objects to Item 20 on the basis that it is oppressive, burdensome and overly broad. She maintains that this request asks her to

transcribe Plaintiff's voluminous chart, which predates the incidents of which Plaintiff complains. The referee recommends that production of this item be ordered. The referee disagrees that it calls for a transcription or compilation. It calls for the production of a "legible, typewritten reproduction of the original medical chart of EVA M. GATES . . ." . The referee recommends that this document be produced only if it is in existence. The referee recommends that the court not order the defendant to conduct such an interpretation and transcription of handwritten notes if one is not already in existence. Plaintiff has the remedy of clarifying the meaning of handwritten notes in deposition.

Finally, defendant SHARON F. BILLON, M.D. objects to Item 21. This asks for the production of the Physician's Desk Reference that the defendant relied upon in administering drugs to the plaintiff. The referee recommends that this item be ordered produced.

B. Plaintiff's Request to Produce Documents and Tangible Things at Deposition of Elena Martinho, M.D.

The referee recommends that the court grant the request for a protective order with respect to Items 1, 5, 15, 16 and 17 on the basis of the attorney-client and work product privileges.

On the same grounds, the referee recommends that a protective also issue with respect to Items 2 and 3, except to the extent that those two categories seek written statements or reports by the plaintiff or any of her family members.

The referee recommends that the court deny the request for a protective order with respect to Item 12, if such a document is in existence. Again, Defendants should not be made to create a legible, typewritten reproduction of the original chart. Plaintiff's remedy is to question the defendant on the original medical chart and seek clarification at deposition. Production should be ordered only if such a

document is already in existence as it would otherwise be burdensome.

The referee recommends that the request for protective order be denied with respect to Items 13 and 14.

C. Plaintiff's Request to Produce Documents and Tangible Things at Deposition of Susie Morton, M.D.

The referee recommends that the court grant the request for a protective order with respect to Items 1, 4, 13, and 14 on the basis of the attorney-client and work product privileges.

On the same grounds, the referee recommends that a protective also issue with respect to Items 2 and 3, except to the extent that those two categories seek written statements or reports by the plaintiff or any of her family members.

The referee recommends that the court deny the request for a protective order with respect to Items 9, 11 and 12, if such a document is in existence. With respect to Items 9 and 11, Defendants should not be made to create a legible, typewritten reproduction of the original chart. Plaintiff's remedy is to question the defendant on the original medical chart and seek clarification at deposition. Production should be ordered only if such a document is already is existence as it would otherwise be burdensome.

The parties have asked for an advisory opinion and the referee notes that the defendant did not make objection to Items 15 and 17, with respect to defendant SUSIE MORTON. The arbitrator would sustain objections to those items had such objection been made .

## RECOMMENDATIONS REGARDING THE INSURANCE POLICIES

The parties have requested that the referee address Plaintiff's right to receive copies of defendants' insurance policies. This is an Advisory opinion in that there is no motion pending in that regard. The referee is satisfied that Code of Civil Procedure section 2017, in allowing the discovery of the contents of an insurance policy, requires that upon a proper request the policy be delivered. While said section does not expressly so provide and the referee could find no case law on point, the need to disclose the content of a policy is tantamount to requiring the actual policy and it is the belief of the referee that the legislature intended that the policies of insurance themselves be discoverable in the absence of some other specific objection. The referee recommends that the policies be made available if Plaintiff should insist . The referee would also note that, based on what was presented at oral argument by defense counsel, Plaintiff should have no worry about insurance coverage, nor need for the actual policies themselves.

## RECOMMENDATION REGARDING THE REFEREE'S FEES

The referee has spent the following amount of time on the reference as reflected in the attached invoice which is attached as Exhibit "A." The referee has actually spent more time on this matter than the invoice reflects. The referee further recommends that the parties avoid further need for the services of the referee. These discovery disputes are costly to everyone and have taken a substantial amount of time on the part of the referee to resolve. These issues should be resolved amongst the parties. The referee also serves notice herewith that in the future, in the absence of substantial justification, it will recommend that the losing party on discovery issues be made to pay the entire amount

of the referee's fees and expenses attributable to resolving the disputes the losing party has created or failed to resolve.

Respectfully submitted,
SMITH, HELENIUS & HAYES

By: S/CHRISTOPHER A. HELENIUS

SECOND APPELLATE DISTRICT ,DIVISION SIX
STATE OF CALIFORNIA

EVA M. GATES, Petitioner,

v. 2d Civil B084747

SUPERIOR COURT SAN LUIS
OBISPO COUNTY, CALIFORNIA Respondent.

SHARON F. BILLON, M.D., et al.,
Real Parties in Interest.

ORDER
(Filed July 14, 1994)

THE COURT:

We have read and considered the petition for writ of mandate. As noted by the referee, because of the global and systemic nature of petitioner's claim for injuries , real parties are entitled to discovery into her past medical records.

We deny the petition without prejudice to petitioner moving respondent superior court to have the medical records inspected in camera in order to segregate any irrelevant information ( Slagle v. Superior Court (1989) 211 Cal.App.3d 1309; 1315) ; and to have the trial court fashion a protective order which would prevent disclosure of these records to persons other than counsel and their experts. (See Davis v. Superior Court (1992) 7 Cal.App.4th 1008, 1018; Moskowitz v. Superior Court (1982) 137 Cal. App.3d 313, 317-318.)

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES — Plaintiff.

v. — Case No. CV 074413

SHARON F. BILLON,
M.D., et al., — Defendants

MINUTE ORDER
MOTION FOR COURT'S "IN CAMERA" REVIEW

(Date: August 29, 1994)

Plaintiff is present in pro per. Counsel for Defendant is present.

Court finds that this motion falls within the previous order referring the matter to the referee. Court orders this matter referred to Christopher Helenius for an in-camera review and the clerk is directed to forward the necessary papers to Mr. Helenius.

Court refers this matter to Mr. Helenius for the drafting of an order limiting the disclosure of medical records for legitimate purposes.

Plaintiff objects to Mr. Helenius viewing all of her medical records.

Court's order will stand

SEPTEMBER 1, 1994

Christopher A. Helenius
Smith, Helenius & Hayes
P.O. Box 1446
San Luis Obispo, CA 93406

Re: Gates v. Sharon F. Billon M.D., et al,
CV 074413

Dear Mr. Helenius:

On August 29, 1994, plaintiff's motion for "In Camera" review of medical records and information came before the Hon. Barry Hammer.

Judge Hammer made no decision as to the subject matter and informed the parties present he was transferring all pleadings to your office for a decision on "In Camera" review , by the assigned discovery referee.

In the event the transfer of the pleading have not reached your desk , this letter is to inform you of the judges decision to transfer the matter to you.

I have heard nothing further as to a hearing date with the referee. Please have your office phone me as to your available dates to hear the motion. (phone 773-4251)

Sincerely,
S/Eva M. Gates

cc: Marvin A. Bauer

SEPTEMBER 12, 1994

Christopher A. Helenius
Smith, Helenius & Hayes
P.O. Box 1446
San Luis Obispo, CA 93406

Re: Gates v. Sharon F. Billon, M.D., et al
CV 074413

Dear Mr. Helenius:

On September 1, 1994, I informed you by letter that Judge Hammer was transferring plaintiff's "In Camera" motion to the Referee for hearing.

Having received no response to my previous letter or available dates for a hearing , and in the event the court has not forwarded the documents related to this motion, I would appreciate a notification from your office in regards to these matters.

Please inform me if you need copies of the pertinent documents before coming to some decision on this.

Sincerely,
S/ Eva M. Gates

cc: Marvin A. Bauer

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES Plaintiff,

v. Case No. CV 074413

SHARON F. BILLON, M.D.
et. al., Defendants.

NOTICE OF DEPOSITION; NOTICE TO CONSUMER:

HAROLD. L. SEGAL, M.D., 1301-20th Street, Ste. 440,
Santa Monica, CA 90404

(Served September 7, 1994)

ATTORNEY: S/ MARVIN A. BAUER

NOTICE TO ALL PARTIES AND THEIR ATTORNEY(S)

1. The production of documents by the Custodian of Records of business will be commanded as follows:

AT: 2220 EASTMAN AVENUE, SUITE 102
VENTURA, CALIFORNIA 93003
(BEFORE ANY NOTARY PUBLIC)

HAROLD L. SEGAL, M.D.
1301-20TH STREET, SUITE 440,
SANTA MONICA, CA 90404

TIME OF DEPO.
10/03/94 8:00 AM

ATTACHMENT THREE

ALL DOCUMENTS, RECORDS, AND ITEMIZED STATEMENT OF CHARGES, INCLUDING , BUT NOT LIMITED TO, ALL OFFICE, EMERGENCY ROOM, INPATIENT AND OUTPATIENT CHARTS AND RECORDS, HOSPITAL CHARTS, AND RECORDS, PHYSICAL THERAPY AND REHABILITATION RECORDS, ORIGINAL X-RAYS, AND RADIOLOGICAL REPORTS, CAT SCANS, MRI FILMS, PERTAINING TO THE CARE, TREATMENT, AND EXAMINATION OF THE PLAINTIFF, EVA M. GATES, INCLUDING ANY AND ALL CORRESPONDENCE, REPORTS, OR MEMOS AND INCLUDING ANY AND ALL PHARMACY/PRESCRIPTION RECORDS, FROM JULY 1984 TO THE PRESENT ONLY.

DATE OF BIRTH: 01/17/28.
SS# 342-20-7701

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES Plaintiff,

v. Case No. CV 074413

SHARON F. BILLON, M.D.
et. al., Defendants.

NOTICE OF DEPOSITION; NOTICE TO CONSUMER:
AMENDED

HAROLD SEGAL, M.D.,
140 Casa Street
San Luis Obispo, CA 93401

(Served September 28, 1994)

ATTORNEY: S/ MARVIN A. BAUER

NOTICE TO ALL PARTIES AND THEIR ATTORNEY(S)

1. The production of documents by the Custodian of Records of business will be commanded as follows:

AT: 2220 EASTMAN AVENUE, SUITE 102
VENTURA, CALIFORNIA 93003
(BEFORE ANY NOTARY PUBLIC)

HAROLD SEGAL, M.D.
140 Casa Street
San Luis Obispo, CA 93401

TIME OF DEPO.
10/18/94 8:00AM

ATTACHMENT THREE

ALL DOCUMENTS, RECORDS, AND ITEMIZED STATEMENT OF CHARGES, INCLUDING , BUT NOT LIMITED TO, ALL OFFICE, EMERGENCY ROOM, INPATIENT AND OUTPATIENT CHARTS AND RECORDS, HOSPITAL CHARTS, AND RECORDS, PHYSICAL THERAPY AND REHABILITATION RECORDS, ORIGINAL X-RAYS, AND RADIOLOGICAL REPORTS, CAT SCANS, MRI FILMS, PERTAINING TO THE CARE, TREATMENT, AND EXAMINATION OF THE PLAINTIFF, EVA M. GATES, INCLUDING ANY AND ALL CORRESPONDENCE, REPORTS, OR MEMOS AND INCLUDING ANY AND ALL PHARMACY/PRESCRIPTION RECORDS, FROM JULY 1984 TO THE PRESENT ONLY.

DATE OF BIRTH: 01/17/28.

SS# 342-20-7701

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

CHRISTOPHER A. HELENIUS, REFEREE

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EVA M. GATES Plaintiff,

v. Case No. CV 074413

SHARON F. BILLON, M.D.
et al., Defendants

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(September 29, 1994)

REPORTED BY: CINDY GRIFFITH, CSR #7281

APPEARANCE OF COUNSEL:

FOR THE PLAINTIFF:

SHANE KRAMER
ATTORNEY AT LAW
P.O. BOX 14259
SAN LUIS OBISPO, CA
93406-4259

FOR THE DEFENDANTS:

BAUER, HARRIS & McEVOY
ATTORNEYS AT LAW
925 DE LA VINA STREET
BY: LAUREN JOHN UDDEN

GET TO THAT, ONCE AGAIN, IT AFFIRMS WHAT I'VE KNOWN TO BE THE RIGHT WAY TO DO THIS ALL ALONG. I JUST AVOIDED READING TWO INCHES OF MATERIALS AND NOT HAVING TO READ IT AND NOT HAVING TO CHARGE ANYONE.

LET ME HEAR FROM YOU, SHANE, ABOUT THIS IN CAMERA INSPECTION. TELL ME WHAT YOU THINK THE PROTOCOL SHOULD BE. HOW DO YOU THINK WE SHOULD GO ABOUT THIS? WHAT ARE THE ISSUES OF CONCERN TO YOUR CLIENT AND HOW WOULD YOU LIKE ME TO APPROACH THIS?

DO YOU WANT TO TAKE ANOTHER COUPLE OF MINUTES TO TALK TO HER ABOUT THAT?

MR. KRAMER: WELL, YEAH, WE'LL JUST GO DOWN TO THE OTHER END OF THE TABLE AND BANTER BACK AND FORTH.

(DISCUSSION HELD OFF THE RECORD BETWEEN MS. GATES AND MR. KRAMER.)

MR. KRAMER: BACK ON THE RECORD.

THE REFEREE: WE'RE BACK ON THE RECORD, YES

WHAT ARE THE ISSUES THAT ARISE OUT OF THIS IN CAMERA INSPECTION ? THE FIRST AND FOREMOST ISSUE I THINK WAS WHAT THE DEFENDANTS SHOULD BE ALLOWED TO HAVE, AND UNFORTUNATELY THE COPY SERVICE WENT FORWARD AND PROVIDED THEM ALL THE RECORDS WITHOUT RESTRICTION. SO I GUESS TO SOME EXTENT THAT ISSUE HAS BEEN MOOTED BY WHAT HAS TAKEN PLACE.

WHAT ARE THE ISSUES THAT ARISE FROM THIS DESIRE FOR AN IN CAMERA INSPECTION?

MR. KRAMER: OF COURSE YOU HIT A MAJOR POINT OF CONCERN FOR THE PLAINTIFF HERE AS FAR AS HOW THESE RECORDS WERE OBTAINED.

BEYOND THAT, CERTAINLY THE RECORDS AND AS FAR AS GOING THROUGH AND TRYING TO PICK RECORDS OUT FOR YOU TO EXCLUDE, WE HAVE NOT DONE THAT. THE FIRST TIME WE'D SEEN THESE RECORDS WAS THIS MORNING.

BUT CERTAINLY ANY RECORDS IN HERE THAT ARE BEYOND THE PARAMETERS THAT WERE SET BY YOU IN YOUR PRIOR ORDER SHOULD BE EXCLUDED FROM ANY FURTHER ACTION OR DISCLOSURE OF RELIANCE, AND THAT IS THE TEN-YEAR LIMITATION THAT WAS PUT ON RECORD. SO CERTAINLY THAT IS ONE POINT TO BEGIN AND LOOK AT, WHAT SHOULD BE EXCLUDED AND SHOULDN'T BE AT THIS POINT.

OTHER THAN THAT , OF COURSE, PLAINTIFF'S POSITION HAS BEEN, AND HAS LONG BEEN, THAT ANY RECORDS THAT ARE NOT RELEVANT TO THE PROCEDURES ON THE CYSTS THEMSELVES WOULD NOT BE APPROPRIATELY

PRESENTABLE AT THIS POINT IN TIME, AND PLAINTIFF CERTAINLY WOULD LIKE TO SEE THAT AS ONE OF THE PARAMETERS IN EXCLUDING RECORDS THROUGH AN IN CAMERA INSPECTION.

BEYOND THAT, ANY RECORDS THAT CERTAINLY WOULD NOT BE SUBSTANTIALLY RELEVANT TO ANY ISSUES OF LOSS OF STAMINA OR FATIGUE SHOULD BE EXCLUDED.

THE REFEREE: MAKE THAT LAST POINT AGAIN.

MR. KRAMER: THAT ANY RECORDS THAT ARE NOT RELEVANT IN ANY WAY OR SUBSTANTIALLY RELEVANT TO PLAINTIFF'S CONDITION OF FATIGUE AND LOSS OF STAMINA SHOULD BE EXCLUDED IN THE IN CAMERA INSPECTION.

THE REFEREE: SO YOU ARE SAYING IN A POSITIVE AND A NEGATIVE SORT OF WAY COLLECTIVELY THAT HER POSITION IS ONLY THOSE RECORDS RELATED TO THE CYST AND PROBLEMS ATTENDANT TO IT AND TREATMENT FOR IT AND PROBLEMS OF LOSS OF STAMINA AND FATIGUE ARE THE RECORDS THAT OUGHT TO BE PROVIDED AND ALLOWED TO THE DEFENDANTS, AND ALL OTHER RECORDS OUGHT NOT TO BE SO PROVIDED?

MR. KRAMER: CERTAINLY IF SHE SAW A DOCTOR COMPLAINING ABOUT FATIGUE OF LOSS OF STAMINA, THAT RECORD WOULD CERTAINLY BE RELEVANT TO THIS CASE. IF, HOWEVER, THE BASIS FOR HER COMPLAINT DOES NOT

ARISE FROM THOSE ISSUES, IT SHOULD BE EXCLUDED.

THE REFEREE: DOES THAT PRETTY MUCH COVER YOUR POSITION ON WHAT RECORDS SHOULD BE PROVIDED? I REALIZE THERE'S GOING TO BE MORE ISSUES THAN THAT CONCERNING THIS INSPECTION. BUT DOES THAT PRETTY MUCH COVER?

MR. KRAMER: I THINK AS FAR AS BROAD PARAMETERS FOR AN INSPECTION AND DECISIONS OF WHAT SHOULD BE INCLUDED AND EXCLUDED - -

THE REFEREE: I'M NOT SUGGESTING MORE. IT SOUNDS LIKE IT ENCOMPASSES THE ISSUES AS PLAINTIFF WOULD SEE THEM.

MR. KRAMER: I THINK THAT PROBABLY WOULD COVER THEM.

THE REFEREE: LAUREN.

MR. UDDEN: WELL, THE DEFENDANT'S POSITION IS THAT BASED ON THE CLAIMS THAT THE PLAINTIFF HAS MADE IN THIS CASE THAT VIRTUALLY HER ENTIRE PAST MEDICAL HISTORY HAS BEEN PUT IN ISSUE.

TO REFAMILIARIZE YOU WITH THE COMPLAINTS, AS YOU MENTIONED, HAVE BEEN DESCRIBED AS GLOBAL AND SYSTEMIC. SHE'S TALKED ABOUT ATROPHY OF TISSUE, DEPRESSION IN HER LOWER BACK, INFECTION AT THE SITE OF ANOTHER CYST. SHE STATES HER GENERAL HEALTH HAS BEEN INJURED, LACK OF STAMINA, DECREASED RESISTANCE TO INFECTION. SHE SAID SHE HAD A SEVERE REACTION FOR TWO DAYS AFTER THE INJECTION. SHE COMPLAINS OF ITCHING AND DEEP PAIN AT THE INJECTION SITE AND SHE COMPLAINS OF EXTREME FATIGUE ENCOMPASSING HER ENTIRE BODY.

A SECOND REASON WHY THE DEFENDANTS FEEL THAT HER ENTIRE MEDICAL HISTORY HAS BEEN PUT INTO ISSUE IS THE CLAIM THAT IS BEING MADE, AS TESTIFIED TO BY PLAINTIFF'S EXPERT YESTERDAY IN DEPOSITION, AND THAT CLAIM IS FOR THE LOSS-OF-EARNINGS CLAIM, WHICH IS SOMEWHERE IN THE VICINITY OF $150,000.

AND THIS LOSS OF EARNING CLAIM IS PREMISED ON PLAINTIFF'S CONTENTION THAT SHE HAS BEEN SEVERELY DISABLED FROM WORKING AND IF IT HAD NOT BEEN FOR THAT SEVERE DISABILITY SHE WOULD HAVE WORKED AND EARNED EITHER UP TO THIS POINT OR IN THE FUTURE $150,000.

NOW, UNDER THOSE CIRCUMSTANCES, DEFENDANT'S CERTAINLY HAVE THE RIGHT TO SHOW THAT, IN FACT. ANY DISABILITY SHE HAS OR ANY INABILITY TO WORK OR ANY REASONS WHY SHE HAS NOT WORKED ARE NOT DUE TO WHAT HAPPENED HERE, NAMELY THE INJECTION, BUT HAVE TO DO WITH NUMEROUS OTHER PHYSICAL AND MEDICAL PROBLEMS THAT SHE'S HAD.

THE DEFENDANTS CERTAINLY HAVE THE RIGHT TO EXPLORE THOSE AREAS TO DETERMINE WHICH OTHER MEDICAL PROBLEMS OR DIFFICULTIES MIGHT BE THE REASON THAT SHE IS NOT WORKING AS OPPOSED TO THE VERY LIMITED INVOLVEMENT THAT THE DEFENDANTS HAD WITH HER

I THINK IT ALSO SHOULD BE KEPT IN MIND THAT WE'RE STILL AT THE DISCOVERY STAGE HERE. THIS IS NOT AN EVIDENTIARY HEARING AT TRIAL TO DETERMINE WHAT IS GOING TO BE ADMISSIBLE AND WHAT IS NOT. I THINK

THAT IT IS VERY DIFFICULT AT THIS STAGE, ESPECIALLY FOR A NONMEDICAL PERSON, TO GO THROUGH THESE RECORDS AND SAY THAT ANY OF THESE THINGS AREN'T IN SOME WAY RELATED OR POTENTIALLY RELATED TO THAT.

PART OF THE THING THAT'S IN ISSUE HERE IS THE SCOPE OF DR. RALSTON'S DEPOSITION, AND PROBABLY THE LARGEST NUMBER OF RECORDS ARE FROM DR. RALSTON. I THINK THAT CERTAINLY THAT DEPOSITION MAY VERY WELL SHED SOME MORE LIGHT ON WHAT REALLY THE ISSUES HERE ARE, BUT I THINK AT THIS STAGE FOR THE ATTORNEYS OR THE COURT TO MAKE THAT DETERMINATION, I THINK IS REALLY NOT APPROPRIATE.

SO I THINK UNDER THOSE CIRCUMSTANCES, IT'S OUR POSITION THAT THIS ENTIRE MEDICAL HISTORY IS DISCOVERABLE AND THAT WE SHOULD BE ALLOWED TO QUESTION DR. RALSTON ABOUT IT.

I SHOULD MAYBE ALSO JUST FURTHER NOTE THAT IN GOING THROUGH THE RECORDS THERE CERTAINLY -- FIRST OF ALL, IN THE TEN-YEAR LIMITATION, I THINK THAT'S BEEN TAKEN CARE OF BECAUSE THE SUBPOENAS WERE LIMITED TO TEN YEARS. AND I THINK YOU'LL FIND THAT THERE ARE NO RECORDS THAT ARE GOING BACK BEYOND THAT PERIOD OF TIME. SO I THINK THAT LIMITATION HAS ALREADY BEEN DEALT WITH.

IN GOING THROUGH THE RECORDS AND, FOR EXAMPLE, IN DR. RALSTON'S RECORDS, I NOTED THAT THERE WERE REFERENCES THERE INVOLVING THE BACK AND INVOLVING SKIN PROBLEMS STARTING FROM 1985 GOING UP VIRTUALLY TO THE MORE RECENT VISITS THAT

THE PLAINTIFF HAS HAD WITH HIM. I THINK CERTAINLY THOSE AREAS ARE DIRECTLY RELATED TO MATTERS AT ISSUE IN THIS CASE.

I THINK AS TO MED-STOP, THERE'S ANOTHER ISSUE WHERE THAT COMES INTO PLAY. THE MED-STOP RECORDS, AS YOU'LL SEE, THERE ARE NOT VERY MANY , BUT THEY DEAL WITH A VISIT THAT WAS MADE BY THE PLAINTIFF, I BELIEVE , IN AROUND JULY OF 1993. I MIGHT HAVE THE EXACT DATE WRONG. BUT SOMEWHERE IN THAT TIME PERIOD. IT'S AFTER THE EVENTS THAT ARE AT ISSUE IN THIS CASE.

AND THOSE EVENTS BECOME RELEVANT FOR ANOTHER REASON. THERE'S A CLAIM IN THIS CASE AGAINST DR. MARTINHO OF ABANDONMENT. THE PLAINTIFF CONTENDS THAT AROUND THIS TIME PERIOD THAT SHE ENDED UP GOING TO MED-STOP, THAT SHE CALLED UP DR. MARTINHO. SHE CONTENDS THAT SHE WAS REFUSED TREATMENT BY DR. MARTINHO FOR THE CONDITION AT THAT TIME, WHICH IS AGAIN I BELIEVE INVOLVING A CYST. THAT FOR THAT -- BECAUSE SHE WAS REFUSED TREATMENT, SHE THEN WENT TO MED-STOP WITHIN A MATTER OF HOURS AFTER THAT, AND THAT SHE DID RECEIVE TREATMENT THERE.

SO I THINK CLEARLY THOSE RECORDS ARE RELEVANT AMONG OTHER REASONS ON THE WHOLE ABANDONMENT ISSUE AND WHETHER OR NOT THAT CAUSED PLAINTIFF--

THE REFEREE: LOSS.

MR. UDDEN: DAMAGE

THE REFEREE: OKAY

MR. KRAMER: I WOULD ALSO --

THE REFEREE: ARE YOU DONE, LAUREN?

MR. UDDEN: YES, I THINK THAT PRETTY WELL COVERS IT.

THE REFEREE: IF YOU THINK OF SOMETHING THAT YOU WANT TO BRING UP, THAT'S FINE. WE'RE DOING THIS INFORMALLY BECAUSE WE DON'T REALLY HAVE THE PAPERWORK FROM THE PLAINTIFF BEFORE US REQUESTING ANY SPECIFIC RELIEF. SO I'M GOING TO ALLOW EACH SIDE TO FULLY EXPLORE THIS ISSUE RATHER THAN FOLLOWING A STRICT FORMAT. YOU, THE PLAINTIFF, OUTLINE YOUR CONCERN, RESPONSE AND THEN REPLY.

NOW, BEFORE YOU RESPOND SHANE, I WANT TO JUST MAKE SOME PRELIMINARY OBSERVATIONS SO THAT WE CAN FLUSH THESE ISSUES OUT AND ARRIVE AT A FAIR RESULT.

LAUREN HAS RAISED AN ISSUE THAT I THOUGHT ABOUT AS WELL AND I'M A LITTLE CONCERNED ABOUT, AND THAT IS THAT I'M TRAINED AS A LAWYER AND NOT AS A DOCTOR. AND WHILE I'M --WHILE I DO A LOT OF MEDICAL MALPRACTICE LITIGATION, PRACTICE EXCLUSIVELY IN THE TORT FIELD, PERSONAL INJURY, KNOW QUITE A BIT ABOUT MEDICINE, I'M FAR FROM MEDICALLY QUALIFIED. AND I AM SOMEWHAT TROUBLED BY THE IDEA THAT THE COURT -- OR, WELL, I'M ACTING AS AN OFFICER OF THE COURT HERE -- THE COURT THEN WOULD BE CHARGED WITH THE RESPONSIBILITY OF TRYING TO DETERMINE WHICH OF THESE RECORDS IS MEDICALLY RELEVANT IN LIGHT OF THE ISSUES TENDERED BY THE PLAINTIFF IN THIS LITIGATION AND WHICH ARE NOT.

OBVIOUSLY THERE ARE SOME AREAS THAT POTENTIALLY COULD COME UP HYPOTHETICALLY SPEAKING FOR WHICH I WOULD

BE QUALIFIED. I MEAN IF I SAW WELL, I DON'T EVEN NEED TO COME UP WITH A HYPOTHETICAL. I COULD DO IT ALL DAY LONG. WE COULD ALL IMAGINE HOW THERE ARE SOME MEDICAL ISSUES WHICH WOULD BE QUITE APPARENT TO A LAYPERSON, THAT THEY ARE NOT RELEVANT TO THE ISSUE TENDERED IN THIS LITIGATION.

BUT THERE ARE ENOUGH DIFFERENT CLAIMS BEING MAKE, THERE'S ENOUGH VARIETY TO THE LOSSES BEING CLAIMED THAT IT REALLY DOES OPEN THE DOOR TO FAIRLY WIDE DISCOVERY IN THE CASE.

AND SO HOW DO YOU PROPOSE THAT I SHOULD OBSERVE MY ROLE WHILE I READ THESE RECORDS SINCE I'M NOT MEDICALLY TRAINED?

MR. KRAMER: I DON'T REALLY HAVE A SUGGESTION I WOULD MAKE TO YOU THAT'S GOING TO BE OF ANY HELP. IF WHAT YOU ARE SAYING IS YOU NEED TO HAVE SOME OUTSIDE MEDICAL CONSULTING IN ORDER TO MAKE THE DECISIONS YOU NEED TO MAKE, I DON'T KNOW HOW YOU WOULD GO ABOUT DOING THAT.

THE REFEREE: WELL, I THINK THAT -- I THINK THAT THAT USURPS THE ROLE OF YOUR EXPERTS AND THE DEFENSE'S EXPERTS.

MY PERCEPTION OF WHAT MY ROLE SHOULD BE HERE IS TO USE MY BEST JUDGMENT TO DECIDE WHICH RECORDS ARE CLEARLY NOT RELEVANT TO ANY OF THE ISSUES IN THE CASE, WHICH RECORDS CLEARLY ARE RELEVANT TO THE ISSUES THAT ARE RAISED IN THE CASE, AND WHICH RECORDS FALL WITHIN THE GRAY AREA. I THINK THAT ANY THAT FALL CLEARLY WITHIN THE BOUNDARIES OF THE CASE

OR IN THE GRAY AREA PROBABLY OUGHT TO BE PROVIDED.

AND THAT EVERYTHING THAT'S PROVIDED SHOULD BE SUBJECT TO AN ORDER THAT I ISSUE ALLOWING THE PLAINTIFF TO MAINTAIN THE MAXIMUM AMOUNT OF PRIVACY THAT SHE CAN CONSISTENT WITH THE LEGITIMATE NEEDS OF THE DEFENDANTS TO PROPERLY ADDRESS THE ISSUES IN THE CASE.

SO THAT IS TO PROVIDE THOSE RECORDS THAT FALL WITHIN THOSE TWO CATEGORIES, CLEAR AND GRAY AREA, BUT TO MAKE AN ORDER THAT SEES TO IT THAT THE RECORDS ARE NOT DISCLOSED TO ANYONE OTHER THAN THE ATTORNEYS, THEIR EXPERTS AND THE PARTIES THEMSELVES AND THE COURT AND THE PERSONNEL. THAT SHOULD , I THINK, COVER IT.

YOU KNOW, TAKE A MOMENT TO DISCUSS THAT WITH YOUR CLIENT.

(DISCUSSION HELD OFF THE RECORD BETWEEN MS. GATES AND MR. KRAMER.)

THE REFEREE: DID YOU HAVE SOMETHING TO ADD?

MR. KRAMER: WELL, I ABSOLUTELY APPRECIATE THAT THAT SORT OF PROTECTIVE ORDER TO SUSTAIN CONFIDENTIALITY OF RECORDS SHOULD BE ISSUED.

AS FAR AS THE PARTIES, THE DEFENDANTS ARE CONCERNED, HOWEVER, I'M NOT SURE THAT SINCE THEIR ATTORNEYS HAVE THE RECORDS AND HAVE ACCESS TO THEIR OWN EXPERTS, THAT THERE'S ANY REASON OR ANY VALUE THAT THE DEFENDANTS THEMSELVES WOULD NEED ACCESS TO THESE RECORDS.

THE REFEREE: THAT MAY BE TRUE.

LET ME ASK THIS: HAVE YOU DISCLOSED THE DEFENDANTS AS EXPERTS IN THE CASE?

MR. UDDEN: YES

THE REFEREE: SO YOU HAVE RETAINED EXPERTS.

MR. UDDEN: RETAINED AND WE'VE –

THE REFEREE: AND YOU'VE NAMED SOME OF THE–

MR. UDDEN: AT LEAST DR. BILLON. I'M NOT SURE IF WE'VE – I THINK MAYBE ONLY DR. BILLON. BUT DR. BILLON HAS DEFINITELY BEEN IDENTIFIED AS AN EXPERT.

THE REFEREE: IS HER ROLE AS AN EXPERT AS CONTEMPLATED BY THE DEFENSE GOING TO GO BEYOND AN EXPLANATION OF HER TREATMENT OF THE PATIENT WHICH PRESUMABLY WOULD BE BASED ON WHAT SHE KNEW AT THE TIME SHE PROVIDED CARE?

MR. UDDEN: I SUSPECT IT WILL, YES

THE REFEREE: GO BEYOND THAT?

MR. UDDEN: RIGHT

THE REFEREE: YOU ARE GOING TO ACTUALLY TURN HER INTO AN EXPERT WITNESS ON HER OWN BEHALF TO DEAL WITH THE ISSUES GLOBALLY?

MR. UDDEN: AT LEAST I CAN'T SAY THAT WE'RE NOT AT THIS POINT, BUT I THINK –

THE REFEREE: THAT'S RARELY EVER DONE BECAUSE IT'S SELF-SERVING.

MR. UDDEN: RIGHT. I THINK , THOUGH, THAT I DON'T SEE HOW THERE CAN BE A LIMITATION ON DISCLOSURE TO THE PARTIES. WE'RE GOING TO BE OBVIOUSLY WORKING WITH OUR CLIENTS THROUGHOUT THIS CASE. THEY ARE GOING TO BE

WITNESSES IN THE CASE. THESE DOCUMENTS MAY BE EXHIBITS.

THE REFEREE: HE HAS -- LET ME STOP YOU THERE. HE HAS A POINT THERE. HIS CLIENTS HAVE A RIGHT TO BE INTIMATELY INVOLVED IN THE PREPARATION OF THEIR DEFENSE. AND SHARING WITH THEM EVERYTHING THAT THEY KNOW ABOUT THE CASE CAN FACILITATE THE DEFENDANTS ASSISTING THEIR COUNSEL IN THE PREPARATION OF THAT DEFENSE. I THINK THAT'S A LEGITIMATE PURPOSE.

AND I THINK THAT THE PLAINTIFF CAN BE PROTECTED BY ISSUING – AN APPROPRIATE ORDER. REMEMBER THAT THE DEFENDANTS THEMSELVES ARE SUBJECT TO THE JURISDICTION OF THE COURT. THEY ARE BEFORE THE COURT. THE COURT HAS POWER OVER THEM AS WELL. AND THEY CAN BE MADE THE SUBJECT OF THIS ORDER AS WELL SO THAT THEY NOT DIVULGE THIS INFORMATION TO ANYONE ELSE.

MR. UDDEN: I GUESS THE ONLY OTHER CONCERN I WOULD HAVE IS THAT , OF COURSE, WHEN YOU SAY "ATTORNEYS," I WOULD TAKE IT YOU MEAN ALL EMPLOYEES OF OUR LAW FIRM?

THE REFEREE: OF COURSE.

MR. UDDEN: BECAUSE OBVIOUSLY OTHER EMPLOYEES WILL BE DEALING WITH IT.

THE REFEREE: IT'S ALWAYS THAT WAY.

MR. UDDEN: THE OTHER THING IS WE HAVE AN INSURANCE CARRIER INVOLVED. OBVIOUSLY THEY GET VARIOUS INFORMATION FROM US, PRIVILEGED INFORMATION. AND SO IF IT'S NOT OTHERWISE UNDERSTOOD, THEY WOULD CERTAINLY HAVE TO BE A PART OF IT.

THE REFEREE: I THINK THAT THAT'S UNDERSTOOD, TOO, BECAUSE THEY ARE THE ONES

THAT ARE AT RISK. THEY ARE THE ONES THAT HAVE FINANCIAL RESPONSIBILITY AND NEED TO BE IN THE LOOP. ALTHOUGH THEY ARE NOT DIRECTLY DEFENDANTS THEMSELVES, THEY ARE THE ONES THAT BEAR THE FINANCIAL RESPONSIBILITY FOR THE LOSS.

MR. KRAMER: WELL, YEAH, ALL I CAN DO IS RESTATE MY POSITION, AND YOU HAVE TO MAKE A DECISION HERE.

THE REFEREE: I UNDERSTAND THAT. I JUST WANT TO FLUSH OUT THE ISSUES. I'M NOT SAYING THAT WE HAVE TO ACHIEVE CONSENSUS HERE ON HOW WE HANDLE IT. I JUST WANT TO MAKE SURE THAT I UNDERSTAND WHAT ALL THE ISSUES ARE BECAUSE WE ARE DOING THIS WITHOUT A SOLID PAPER TRAIL.

AND I HAVE NOT MADE UP MY MIND WHAT I'M GOING TO DO EITHER, I'M JUST TRYING TO FULLY UNDERSTAND ALL THE ISSUES.

MR. KRAMER: ONE OF THE THINGS I WOULD MENTION, THOUGH IS THAT I WOULD THINK THAT EVEN WITH THE LIMITATION ON DISCLOSURE, THAT FOR THE NEEDS OF THE INSURANCE CARRIER, FOR THE NEEDS OF THE DEFENDANTS THEMSELVES, THAT COUNSEL CERTAINLY IN A GENERAL SENSE CAN KEEP THEIR CLIENTS AND THE INSURANCE COMPANY INFORMED OF SOME OF THE PARAMETERS OF THE INFORMATION WITHOUT DISCLOSING THE DOCUMENTS THEMSELVES. AND TO THAT EXTENT PERHAPS I COULD SEE SOME LENIENCY THERE JUST AS IF THESE WERE FINANCIAL RECORDS AND WE WERE LOOKING FOR THE POTENTIAL FOR PUNITIVE DAMAGES, AND THE ORDER WAS ISSUED THAT DEFENDANTS , THE PARTIES NOT BE ENTITLED TO THOSE RECORDS EVEN THOUGH IT CERTAINLY IS UNDERSTOOD

THAT COUNSEL IS GOING TO -- IT'S GOING TO BE APPROPRIATE FOR COUNSEL TO TELL THEIR CLIENTS THAT, WELL, BASED ON THE INFORMATION WE GOT IN THESE CONFIDENTIAL RECORDS, IT LOOKS LIKE WE HAVE PUNITIVE DAMAGES HERE THAT MIGHT FLY HERE BECAUSE OF THE FINANCIAL INFORMATION WE HAVE HERE.

MR. UDDEN: LET ME SAY I THINK ANY LIMITATION LIKE THAT IS REALLY INVADING THE ATTORNEY-CLIENT PRIVILEGE . HOW CAN WE -- HOW IS IT APPROPRIATE FOR US TO BE CONCERNED WHAT WE DISCLOSE TO OUR CLIENTS? THAT'S JUST NOT AN APPROPRIATE LIMITATION ON THE ATTORNEY-CLIENT RELATIONSHIP. AND I DON'T THINK -- I THINK THE CLIENT HAS EVERY RIGHT TO KNOW FROM US WHAT THE INFORMATION IS, GOOD OR BAD, FOR THEIR CASE. THEY HAVE TO MAKE DECISIONS AS FAR AS SETTLEMENT AND THINGS OF THAT NATURE.

THE REFEREE: WELL, THE LAW FAVORS THE POLICY OF PEOPLE THOROUGHLY EXPLORING THE STRENGTHS AND WEAKNESSES OF THEIR CASES. AND IT DOES THAT -- IT HAS THAT POLICY BECAUSE ONE OF THE PRIMARY GOALS OF THE JUDICIAL SYSTEM IS TO ACHIEVE SETTLEMENT OF CASES, TO AVOID TRIAL WHERE AT ALL POSSIBLE.

SO TO PUT IN A POSITION WHERE THEY CAN'T FULLY EXPLORE THE STRENGTHS AND WEAKNESSES IN THEIR CASE BY HAMPERING COMMUNICATIONS BETWEEN ATTORNEY AND CLIENT NOT ONLY OBSTRUCTS THE RELATIONSHIP AS MR. UDDEN HAS INDICATED BUT IT ALSO OBSTRUCTS THE COURT PROCESS, THE PROCESS WHERE THE COURT HAS A LEGITIMATE INTEREST.

LET ME ASK YOU THIS, SHANE: IS THERE -- WITHOUT TELLING ME WHAT IT IS, IF THERE IS ANYTHING , IS THERE ANY PARTICULAR ISSUE OR SET OF ISSUES OR THINGS IN THESE RECORDS THAT YOUR CLIENT IS PARTICULARLY CONCERNED ABOUT, AND IF THERE IS , IS IT SOMETHING SHE WOULD LIKE TO TELL ME IN PRIVATE? CAN YOU ANSWER THOSE TWO QUESTIONS WITHOUT TELLING ME WHAT IT IS?

MR. KRAMER: WELL, OF COURSE, PART OF THE PROBLEM WE HAVE AS WELL IS THAT UNTIL YESTERDAY WE WERE UNAWARE THAT COMPEX HAD ACTUALLY GONE THROUGH WITH THE SUBPOENAS AND GOTTEN THE DOCUMENTS.

THE REFEREE: RIGHT

MR. KRAMER: THE ONLY THING WE HAD WAS MAIL FROM MR. BAUER'S OFFICE WAS THE -- WAS YOUR DECISION, YOUR PRIOR DECISION WITH AN UNSIGNED ORDER, LOOKED LIKE A PROPOSED ORDER ATTACHED TO IT.

SO HAVING GONE THROUGH THE WRIT PROCESS AND THE COURT ON WRIT HAVING SAID, GEE, APPROACH THE LOWER COURT ON GETTING AN IN CAMERA INSPECTION AND LIMITATION ON DISCLOSURE TO, YOU KNOW , THE COUNSEL AND EXPERTS IN THE CASE, WE WERE APPROACHING IT FROM THAT POINT OF VIEW UP UNTIL YESTERDAY WHEN IT WAS DISCOVERED THAT, FROM I BELIEVE A STATEMENT THAT MR. BAUER HAD MADE ON THE PHONE, THAT THE RECORDS HAD ACTUALLY BEEN PRODUCED.

SO AS FAR AS US HAVING GOTTEN A COPY OF THESE RECORDS AND GOING THROUGH THEM AND WHAT WE WOULD AND WOULDN'T OBJECT TO, THERE REALLY HASN'T BEEN THAT OPPORTUNITY.

EVEN SITTING HERE THIS MORNING , OF COURSE , MR. UDDEN AND I WERE SPEAKING ABOUT OTHER THINGS. I HAVEN'T HAD A CHANCE TO GO THROUGH THESE AS WELL.

I WOULD ADMIT TO YOU RIGHT NOW IN TALKING WITH MRS. GATES IT COULD VERY WELL BE THAT THE ACTUAL DOCUMENTS THAT WERE ACQUIRED THROUGH COMPEX COULD ALL BE ACCEPTABLE TO US AFTER HAVING ONCE GONE THROUGH THEM. BUT THAT HAS NOT YET HAPPENED.

THE REFEREE: SO WHAT YOU ARE TELLING ME IS YOU CAN'T RESPOND TO MY QUESTION BECAUSE YOU DON'T KNOW WHAT IS IN THOSE RECORDS?

MR. KRAMER: BASICALLY THAT'S RIGHT.

THE REFEREE: NOW, OBVIOUSLY LAUREN HAS ALREADY LOOKED AT THESE RECORDS BECAUSE COMPEX HAS INADVERTENTLY PROVIDED THEM.

DO YOU WANT TO RECESS FOR LUNCH AND LOOK THE RECORDS OVER WITH HIM, COME BACK AND FURTHER ADDRESS THIS ISSUE, SAY AT 1:15? WOULD THAT BE AN APPROPRIATE THING TO DO, OR DO YOU WANT ME TO SIMPLY GO THROUGH INDEPENDENTLY AND ARRIVE AT SOME SORT OF A DECISION ABOUT WHAT THEY SHOULD HAVE AND WHAT THEY SHOULD NOT HAVE?

MR. UDDEN: LET ME MENTION TO YOU A PROBLEM I HAVE . I HAVE AN APPOINTMENT , WHICH PROBABLY COULD BE CHANGED, AT 1:30 IN SANTA MARIA.

MR. KRAMER: I HATE TO ADMIT IT, BUT THIS DAY IS FAST BECOMING A PROBLEM FOR ME AS WELL. IT WOULD -- IT WOULD SAVE YOU TIME IF WE COULD GET TOGETHER AT SOME POINT AND

DO THIS, BUT I DON'T KNOW WHEN YOU'LL BE BACK THIS WAY AND WE'LL BE ABLE TO DO SOMETHING.

THE REFEREE: WELL, I'M JUST -- I'M PERFECTLY WILLING TO GO THROUGH THESE RECORDS THIS AFTERNOON AND MAKE A DECISION AS BEST I CAN, BASED ON WHAT'S BEFORE ME. I'M JUST WONDERING IF, I MEAN, IF IT TURNS OUT THERE REALLY ISN'T ANYTHING IN THERE TO BE CONCERNED ABOUT, THEN WE'VE EXPENDED AS AWFUL LOT OF TIME AND MONEY OVER NOTHING.

MR. UDDEN: CERTAINLY OUR PREFERENCE WOULD BE FOR YOU TO DO THAT ONLY BECAUSE OF THE TIME PARAMETERS. WE'VE ALREADY GONE PAST THE RALSTON DEPOSITION DATE.

THE REFEREE: I'LL JUST DO IT. I'M GOING TO DO IT.

MR. UDDEN: UNFORTUNATELY WE'RE IN THAT SITUATION.

THE REFEREE: I'M GOING TO READ THESE RECORDS, REACH THE BEST POSSIBLE DECISION THAT I CAN GIVEN THE LIMITS OF MY ABILITY, HAVING NOT BEEN MEDICALLY TRAINED. AND I'M GOING TO MAKE A RECOMMENDATION BASED ON THAT.

LET ME ASK YOU THIS, LAUREN; HAVE THESE RECORDS THAT YOU'VE BROUGHT HERE TODAY BEEN COPIED BY YOUR OFFICE?

MR. UDDEN: NO. IN FACT, I THINK I MENTIONED TO YOU, OR AT LEAST I MENTIONED TO SHANE, THAT THESE ARE OUR ONLY COPIES AND I WANTED YOU TO BE AWARE OF THAT; THAT WE DID NEED THEM BACK BECAUSE THEY ARE OUR ONLY COPIES.

THE REFEREE: WHAT I WILL DO, SO, SHANE, LISTEN UP HERE SO YOU UNDERSTAND WHAT I'M

ABOUT TO DO. WHAT I WILL SO IS WITH THAT ASSURANCE THAT THEY'VE NOT COPIED THESE RECORDS, AT LEAST THAT PUTS THE PLAINTIFF IN A BETTER POSITION IF I FEEL THAT THERE ARE THINGS THAT THEY OUGHT NOT TO HAVE, WHAT I'M GOING TO DO IS I'M GOING TO REMOVE FROM THESE RECORDS ANY DOCUMENT THAT I THINK ARE INAPPROPRIATE. AND I'LL SET THOSE ASIDE IN A SEPARATE PILE OF RECORDS THAT I'LL PUT IN AN ENVELOPE AND HOLD. AND I'LL MAKE COPIES OF THE RECORDS THAT I HAVE REMOVED -- NOTES ABOUT WHAT I'M GOING TO DO HERE SO I FOLLOW MY PLAN -- AND THEN PROVIDE -- SHALL I PROVIDE EACH OF YOU WITH -- I'M TRYING TO THINK OF HOW TO HANDLE THIS.

ONE THING I COULD DO IS TAKE ANY DOCUMENTS THAT I THINK ARE INAPPROPRIATE, I COULD REMOVE THEM, PUT THEM IN AN ENVELOPE AND SIMPLY PROVIDE THAT TO THE COURT. I COULD BUNDLE THOSE SEPARATELY SO WE KNOW WHERE THEY CAME FROM -- THEY CAME FROM RALSTON'S RECORDS, THEY CAME FROM MED-STOP'S RECORDS -- AND MAKE A COPY OF THE COVER PAGE OF EACH OF THE COMPEX DOCUMENTS SO THAT WAY WE CLEARLY KNOW WHAT THEY ARE. AND THAT WAY THE SUPERIOR COURT WOULD BE THE CUSTODIAN OF THESE. I'D PUT THEM IN A SEALED ENVELOPE AND MAKE AS PART OF MY ORDER A RECOMMENDATION THAT THEY BE KEPT SEALED BY THE COURT.

THE QUESTION THAT I HAVE IS THAT IF I DO THAT, HOW WILL THE TWO OF YOU KNOW WHICH DOCUMENTS IT IS THAT I'VE REMOVED, AND DO YOU NEED TO KNOW IN ORDER TO PROPERLY REPRESENT YOUR CLIENT'S

INTERESTS? THAT'S THE ISSUE I'M WRESTLING WITH.

MR. KRAMER: PROBABLY -- GOSH, I DON'T KNOW HOW TO DO THIS, BUT PROBABLY THE ONLY WAY FOR BOTH OF US TO KNOW AT THAT POINT EXACTLY WHAT HAS BEEN PASSED UPON AS BEING APPROPRIATE RECORDS WOULD BE FOR BOTH OF US TO GET SETS OF THOSE RECORDS FROM YOU SO THAT WE KNOW THESE ARE THE RECORDS THAT ARE ALLOWABLE. IS THERE A PROBLEM THERE?

MR. UDDEN: YEAH, I WOULD GIVE THE ORIGINAL BACK TO LAUREN'S OFFICE. I COULD MAKE A COPY OF THOSE FOR YOU. AND I SUPPOSE WHAT I COULD DO IS MAKE A COPY OF THE REMOVED DOCUMENTS AND PROVIDE A COPY OF EACH OF THOSE TO YOU WITH AN ORDER THAT THESE ARE THE DOCUMENTS THAT ARE NOT TO BE DIVULGED.

MR. KRAMER: WE WOULD PROBABLY WANT TO HAVE THOSE SOMEHOW STAMPED OR SOMEHOW IDENTIFIED INDIVIDUALLY AS BEING, YOU KNOW CONFIDENTIAL AND DO NOT DIVULGE.

THE REFEREE: NOT SUBJECT TO DISCLOSURE.

MR. KRAMER: ABSOLUTELY.

THE REFEREE: RIGHT . I COULD DO THAT AS WELL.

MR. KRAMER: ON THE OTHERS, PERHAPS --

THE REFEREE: THAT'S WHY I WAS THINKING IF YOU TWO MET AND THEM THE THREE OF US MET AFTER THAT, WE COULD GO THROUGH THESE DOCUMENTS. YOU WOULD BOTH HAVE AN OPPORTUNITY TO SEE WHAT THEY ARE AND TO RESPOND AND TO FURTHER SHARE WITH ME YOUR THOUGHTS. BUT THAT'S ALL RIGHT. I'LL GO THROUGH THEM. I'LL MAKE A PRELIMINARY

DECISION HERE ABOUT THOSE. I'LL GIVE YOU MY PROPOSED DECISION , AND THEN IF YOU HAVE FURTHER RESPONSES IN LIGHT OF WHAT I'VE DONE, YOU CAN SUBMIT A LETTER TO ME AND THEN I'LL GIVE YOU, LIKE, IF I CAN DO THIS TODAY, THEM I WILL GIVE YOU, LIKE , AND GET THAT OUT TO YOU -- THAT'S A TALL ORDER GETTING ALL OF THAT OUT IN HALF A DAY. IF I COULD GET THAT OUT BY TOMORROW, THEN YOU PEOPLE WOULD HAVE IT BY FRIDAY. AND YOU COULD GET BACK TO ME BY, LET'S SAY, TUESDAY.

MR. UDDEN: TOMORROW IS FRIDAY.

THE REFEREE: TOMORROW IS FRIDAY. IF I GOT IT OUT FRIDAY, YOU'VE HAVE IT ON MONDAY. YOU COULD GET BACK TO ME BY TUESDAY WITH A LETTER. YOU COULD GET A LETTER OUT MONDAY TO ME THAT I'D HAVE ON TUESDAY. OR YOU COULD FAX IT TO ME. IT WOULD BE BETTER. FAX ME LETTERS OR HAND DELIVER THEM BY TUESDAY. BECAUSE IF I DON'T HAVE ANYTHING BY TUESDAY, THEN I WOULD GIVE THE COURT MY ORDERS BY WEDNESDAY. AND THAT WOULD EXPEDITE THIS PROCESS.

MR. KRAMER: OKAY.

THE REFEREE: DOES THAT SOUND LIKE A GOOD PLAN?

MR. UDDEN: WE WOULD PREFER YOU DO THAT SO THIS PROCESS DOES NOT HOLD UP THE OTHER THINGS.

MR. KRAMER: ABSOLUTELY.

THE REFEREE: DOES THAT SOUND LIKE AN INTELLIGENT WAY TO GO ABOUT THIS? TWO ORDERS. ONE RE IN CAMERA; ONE RE ALL OTHER ISSUES. IN CAMERA ORDER WE WILL--

MR. UDDEN: I GUESS THE ONLY OTHER THING IS WE STILL HAVE THE MEDICAL HISTORY

QUESTION. YOU WOULD BE ADDRESSING THAT THEN?

THE REFEREE: TODAY. AS SOON AS I READ THESE RECORDS.

MR. UDDEN: OKAY.

THE REFEREE: I'M GOING TO READ THESE RECORDS AND I'M GOING TO TAKE A L00K AT 2032 AGAIN TO REFAMILIARIZE MYSELF WITH THE NUANCES OF THE CODE. THEN ISSUE A DECISION ON THAT.

MR. KRAMER: WHEN YOU ARE STAMPING THE DOCUMENTS, ONE WILL HAVE "DO NOT DISCLOSE." WOULD YOU PUT "FOR COUNSEL'S EYES ONLY" AND WE WOULD UNDERSTAND THAT WOULD MEAN WITHIN THE PARAMETER OF YOUR ORDER CONCERNING DISCLOSURE?

THE REFEREE: "COUNSEL AND COURT'S EYES ONLY."

MR. KRAMER: THAT WOULD BE UNDERSTOOD TO MEAN EXPERTS AND WHOEVER ELSE YOU DECIDE TO DISCLOSE IT TO.

THE REFEREE: PARTIES. ALL RIGHT.

MR. KRAMER: I'VE ONLY GOT ONE OTHER THING ON IN THIS WHOLE AREA TO BRING UP IF YOU ARE READY.

THE REFEREE: READY.

MR. KRAMER: PART OF THE DEPOSITION NOTICE TO DR. RALSTON INCLUDED A REQUEST FOR PRODUCTION OF DOCUMENTS. I WOULD NOT HAVE A PROBLEM IN HIS PRODUCTION OF HIS MEDICAL DOCUMENTS, HIS RECORDS AND FILES, TO THE EXTENT THAT THEY ARE ASKING FOR ORIGINALS OF THINGS THAT YOU'VE PASSED UPON ARE PROPERLY DISCLOSABLE UNDER THE ORDERS THAT EXIST. BUT TO SIMPLY REVIEW A FILE OR EVEN GO THROUGH A FILE TO SEARCH FOR THAT

ORIGINAL, I WOULD THINK WOULD BE SOMEWHAT INAPPROPRIATE BECAUSE NOW WE'RE INTO THE TEN YEARS THAT'S GOING TO APPLY AND PERHAPS NONDISCLOSURE OF CERTAIN RECORDS THAT WOULD APPLY. SO I FEEL IT'S KIND OF INAPPROPRIATE TO HAVE A WIDE OPEN YOU WILL PRODUCE THESE TYPES OF THINGS TO US TO REVIEW AND STILL NOT HAVE THAT REVIEW OF HIS RECORDS IN ACCORDANCE WITH WHATEVER PARAMETERS WE ALREADY HAVE IN EXISTENCE.

THE REFEREE: I DON'T KNOW WHAT YOU ARE ASKING FOR. ARE YOU SAYING THAT YOU WOULD LIKE AN ORDER THAT DR. RALSTON'S DEPOSITION NOT BE CONDUCTED IN SUCH A MANNER THAT INQUIRY LEADS INTO ISSUES THAT CONCERN THE PLAINTIFF'S MEDICAL STATUS MORE THAN TEN YEARS PRIOR IN TIME, OR ON MEDICAL ISSUES THAT WOULD ARISE FROM CERTAIN HEALTH PROBLEMS OR HEALTH CARE PROVIDED BY HIM THAT ARE ALSO THE SUBJECT OF A DO-NOT-DISCLOSE ORDER BASED ON MY REVIEW OF HIS RECORDS?

MR. KRAMER: SOMETHING LIKE THAT WOULD DO IT.

THE REFEREE: ALL RIGHT. UNDERSTOOD. I'LL LOOK AT THAT. I THINK BOTH SIDES WANT THAT ADDRESSED.

MR. UDDEN: YES

THE REFEREE: BETTER MAKE A NOTE. WITH THAT , I THINK WE HAVE CONCLUDED.

MR. UDDEN: I JUST WANT TO MAKE IT CLEAR, GOING BACK AGAIN TO THE ORDER ON THE PHYSICAL EXAM, ONCE WE GET THE -- ONCE WE GET YOUR DECISION ON THAT. I'M CONCERNED ABOUT THE FACT THAT THE EXAMINATION IS ONLY -- IS LESS THAN TWO WEEKS AWAY. AS I

UNDERSTAND IT, YOU ARE GOING TO SEE WHAT YOU CAN DO TO HAVE THE COURT EXPEDITE THE PROCEDURE OF ACTUALLY GETTING AN ORDER SIGNED ON THAT?

THE REFEREE: YES.

MR. UDDEN: OKAY

THE REFEREE: I AM.

MR. UDDEN: AND IN TERMS OF THE TEN DAYS, THE TEN DAYS WOULD RUN FROM TODAY IN TERMS OF THE RESPONSES TO THE DISCOVERY?

THE REFEREE: YES.

MR. UDDEN: OKAY.

THE REFEREE: GOOD POINT. TODAY IS 9-29.

MR. KRAMER: YES

THE REFEREE: SEPTEMBER 29. GOOD POINT. ANYTHING ELSE GENTLEMEN?

MR. KRAMER: I DON'T BELIEVE SO.

MR. UDDEN: I THINK THAT'S IT.

THE REFEREE: YES, WE ARE OFF THE RECORD.

(PROCEEDINGS CONCLUDED AT 12:24 P.M.)

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SMITH, HELENIUS & HAYES
A Law Corporation
1880 Santa Barbara Street
San Luis Obispo, California 93401

October 4, 1994

Shane Kramer
Attorney at Law
P.O. Box 14259
San Luis Obispo, CA 93406

Re: Gates v. Billon, et al., CV074413

Dear Mr. Kramer:

We enclosed a copy of our Statement of Decision that we have forwarded to the court. We also enclose a copy of the letter we have sent to Mr. Udden, returning the medical records to him.

Sincerely.

S/CHRISTOPHER A. HELENIUS

CHRISTOPHER A. HELENIUS, #71161
SMITH, HELENIUS & HAYES
A Law Corporation
Railroad Square
Post Office Box 1446
San Luis Obispo, CA 93406

Referee

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES Plaintiff,

v. Case No. CV074413

SHARON F. BILLON,
M.D., et al., Defendants.

STATEMENT OF DECISION
(Filed October 4, 1994)

On September 29, 1994 a hearing on Defendants' and Plaintiff's motions were heard by Referee, Christopher A Helenius, Esq., of Smith Helenius & Hayes, A law Corporation. The hearing took place at 1800 Santa Barbara Street, San Luis Obispo, California. Present were Shane Kramer, Esq., as attorney for plaintiff, EVA M. GATES, and Lauren John Udden, Esq., as attorney for all defendants.

The hearing was held to resolve the defendants' Motion to Demand Physical Examination, Motion to Compel Further Answers to Interrogatories, with respect to three different sets, Motion to Compel Further Response to Requests for Admissions and Motion to Compel Responses to Form Interrogatories, Set Two. The parties met through

their counsel and conferred prior to the referee actually going forward and hearing the matter. They were able to resolve all of the issues raised by the defense's four motions, but requested that this Statement of Decision issue notwithstanding that resolution. The referee recommends that the court order the plaintiff to attend the physical examination. It is further recommended and agreed that the examination will be noninvasive, will limit palpation to the back area in the vicinity of the injury claimed, that the scope of the examination will concern the area of the plaintiff's back in the vicinity of the cyst, photographs will be permitted of the area, she may have her counsel or her husband attend, but not both. The one issue with respect to the physical examination that the parties were not able to agree to concerned the scope of the questions that the independent medical examiner may ask of the plaintiff, The referee recommends that the medical examiner be allowed to ask any medically relevant questions limited solely by time. The referee recommends , in this regard, that such inquiry be limited to the past ten years.

The parties were able to reach an agreement that the balance of the defendant's motions, as listed above, will call for further responses within ten days of the hearing date, which was held on September 29, 1994. Thus, the referee recommends that the court order that further response to all the above referenced discovery be made not later than October 10, 1994, in view of the fact that the tenth day falls on a Saturday.

The last issue addressed by the referee during the hearing of September 29, 1994, concerns plaintiff's request for an in camera inspection of her medical records. It was agreed that this request could be heard without the parties needing to file any additional paperwork on the subject. The referee recalls the prior Statement of Decision wherein the discovery into the plaintiff's past medical history would be limited to health care problems and health care visits

occurring not more than the ten years last past. With that in mind, and with all of the other potential concerns that plaintiff might wish to raise on her own behalf, the referee has undertaken to look at the medical records that were the subject of the original motion for protective order, first considered by the referee. These records include those of David Ralston, M.D.; Robert Holzauer, M.D., Fair Oaks Pharmacy; Charles Fishman, M.D.; and, two sets of records from Med Stop of Pismo Beach, California.

The medical records of David Ralston, M.D., contain a number of entries that in all likelihood will prove to be irrelevant to the case. The problem the referee faces is that the plaintiff has tendered broad issues in this litigation. Whereas it seemed initially that no loss of earnings claim was tendered, the plaintiff has reconsidered this position and is making such a claim. She has retained Dr. John P. Adams as her forensic economist, who helped establish this loss. This puts in issue her general physical health and stamina and makes relevant other medical conditions that might impede her ability to work. For example, Dr. Ralston's records show that she has had problems of low back pain, has had problems with her neck, has required epidural steroidal injections through Dr. Pobor and history Clearly, there are references in that chart that go beyond the ten year limit already imposed. The referee has decided to leave that portion in the chart and treat this issue in a different way, since the record is already in counsel's possession. Nothing remotely objectionable was found in the Fair Oaks Pharmacy records , Charles Fishman, M.D.'s chart or the two records from Med Stop of Pismo Beach, California, which are identical copies of one another.

Since the referee has recommended that the records be made available to defense counsel, and observes that that in fact has already taken place, one more issue needs to be addressed with respect to these records. The referee recommends that the court order that these medical records

not be divulged to anyone other than the court, the Parties, their expert witnesses and to the defendants' errors and omissions insurers and their employees. The referee further recommends that these records are disclosed to such people listed above on an as needed basis only and that everyone concerned take pains to ensure that as much privacy that can be maintained shall be maintained on the plaintiff's behalf, consistent with the reasonable needs of the defendants and their counsel, in properly preparing their defense and carrying out the responsibilities that arise from this litigation.

Finally, the plaintiff has requested that limits be imposed on the deposition of Dr. Ralston. The referee recommends that Dr. Ralston not be allowed to comment on or be questioned about any medical history concerning the plaintiff that is more than ten years from the date that she instituted her lawsuit against these defendants. The referee further cautions defense counsel that they should limit these questions to those that are medically relevant. The plaintiff has not lost the right to raise any other pertinent objections that present themselves during the course of this deposition.

The referee recommends that each side bear their own attorneys' fee and costs. The referee recommends that the cost of the referee's fees be divided equally among the parties.

DATED: October 4, 1994

Respectfully submitted,
SMITH, HELENIUS & HAYES

BY: CHRISTOPHER A. HELENIUS

Shane Kramer #131242
Attorney at Law
P.O. Box 14259
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(805) 544-5609

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES Plaintiff,

v. Case No. CV074413

SHARON F. BILLON,
M.D., et al., Defendants.

PLAINTIFF EVA GATES OBJECTIONS TO
REFEREE'S STATEMENT OF DECISION
DATED OCTOBER 4, 1994
(Filed October 19, 1994)

To the Superior Court in and for the State of California, County of San Luis Obispo:

PLAINTIFF EVA M. GATES HEREBY submits the following objections to the STATEMENT OF DECISION issued October 4, 1994 by referee CHRISTOPHER A. HELENIUS: (1) Plaintiff objects that the scope of access to these confidential consumer records were allowed to be disclosed by the referee's decision; (2) Plaintiff objects that the scope of access to these confidential consumer records was not limited by the referee solely to attorneys and their retained experts; and (3) Plaintiff further enters for the record her objection to the process and procedure by which confidential medical records were disclosed.

## BACKGROUND

Although the in camera inspection of confidential consumer records (medical records) by referee CHRISTOPHER A. HELENIUS took place on September 29, 1994 and his resultant Statement of Decision was issued October 4, 1994, Plaintiff EVA M. GATES' concern over the disclosure of confidential consumer records began several months ago in the spring of 1994.

As a result of subpoenas for confidential consumer records issued by the defendants to various health care providers of Mrs. Gates, a hearing was heard on May 16, 1994 before the referee on Plaintiff's MOTION FOR ORDER TO QUASH DEPOSITION SUBPOENAS FOR PRODUCTION OF BUSINESS RECORDS. The referee denied Plaintiffs' motion to quash and her request for a protective order. The referee did limit access to medical records to a period of the past ten years, The referee's statement of decision was issued May 24, 1994.

On June 17, 1994 Plaintiff EVA M. GATES filed a PETITION FOR WRIT OF MANDATE OR IN THE ALTERNATIVE WRIT OF PROHIBITION. She also requested an immediate stay of the trial court proceedings. On July 6, 1994, while Plaintiff's writ was pending before the Court of Appeal, Judge Barry Hammer of the San Luis Obispo County Superior Court signed an order adopting the referee's May 24, 1994 Statement of Decision. Although Plaintiff never received a signed copy of the order from the defendant's , the Defendants used that order to begin obtaining confidential consumer records on July 13, 1994. Plaintiff was not aware that the Defendants had actually obtained these confidential consumer records until after September 27,1994.

The Court of Appeal issued its decision on July 14, 1994. Although the Court of Appeal denied Plaintiff's writ , the court did suggest that Plaintiff might seek in camera

review of the records and a protective order limiting access to the records to attorneys and the expert witnesses.

Plaintiff filed a motion for in camera review on July 25, 1994. Judge pro tem, Diane Levison transferred the matter to Judge Barry Hammer who transferred the matter to referee CHRISTOPHER A. HELENIUS. Both Mrs. Gates and Lauren Udden, who represented the defendants were present at the August 29, 1994 hearing where Judge Hammer transferred the matter. In doing so Judge Hammer made the following statements on August 29, 1994:

> I order the clerk to refer this matter to Mr. Helenius with regard to the notice to the request for in camera review and to notice the matter and transfer the necessary paperwork to him.
>
> Secondly, I'm going to refer the matter to Mr. Helenius as well for the purpose of drafting an order limiting any medical - or limiting the disclosure of any medical records for legitimate purposes connected with litigation in this matter.
>
> And both of these matters I'm going to refer to Mr. Helenius. I'll let the clerk notify him of that. (Hearing transcript Page 9, lines 5 through 16, attached hereto).

In response to Mrs. Gates inquiry as to whether or not Judge Hammer would limit time or specify a time for Mr. Helenius to hear the matter, Judge Hammer replied:

> No. I don't know what his calendar is. I'm going to ask him to set it himself. I'm going to have the clerk forward the papers to him. (Hearing transcript, Page 11, lines 10 through 14).

On September 1, 1994 Plaintiff EVA GATES sent a letter to referee CHRISTOPHER A. HELENIUS requesting available dates for a hearing of the "in camera" motion. On September 12, 1994, Plaintiff EVA GATES sent a second letter to the referee requesting available dates for a hearing. Plaintiff received no response to either letter.

On September 27, 1994 Shane Kramer substituted as counsel for Plaintiff EVA GATES who had been representing herself in pro per. Mr. Kramer sought a stay of the deposition pending the "in camera" inspection of consumer records. Judge Hammer referred the ex parte application to the referee. The referee heard the ex parte application of September 28, 1994 and set the in camera record review for September 29, 1994.

By September 29, 1994 the court had apparently still not forwarded paperwork to the referee. Mr. Helenius stated at the hearing:

> We're doing this informally because we don't have the paperwork from the plaintiff before us requesting any specific relief. (Hearing transcript, Page 33, lines 2 through 5, attached hereto).

In order to expedite objections to the Statement of Decision , the referee was going to provide to Plaintiff a copy of the documents he reviewed (Hearing transcript, pages 45, 46, and 47). The referee did not provide a copy of the records to the plaintiff and did not keep a copy of the records for his file, but sent the record back to the defendant's attorney.

Contrary to the representations of the defendants' attorney at the September 29, 1994 hearing, copies of plaintiff's confidential consumer records had been copied and distributed prior to the hearing (Hearing transcript, page 45, lines 2 through 15). On October 12, 1994, Mrs. Gates discovered while submitting to defendants' demand for a physical examination that her medical records had been copied and sent to Dr. Longabaugh in August 1994.

## OBJECTIONS

### A. PLAINTIFF OBJECTS THAT IRRELEVANT CONSUMER RECORDS ARE ALLOWED TO BE DISCLOSED BY THE REFEREE'S DECISION.

The referee recognizes in his decision that certain records that he reviewed are not relevant in this case, are only remotely relevant, or their relevance is questionable. Because Plaintiff has not received a copy of these record form the referee, Plaintiff is not able to independently assess these irrelevant records.

It is an important concept in California case law that when a plaintiff brings a claim for physical, emotional, or mental injury that the plaintiff is "not obligated to sacrifice all privacy". In re Lifschutz (1970) 2 Cal. 415, 85 Cal Rptr. 829. The California Supreme Court has directed the courts of our state to be sensitive to the privacy right in this context, to narrowly formulate discovery requests regarding medical history, and impose direct relevance to the injury claimed in requiring a plaintiff or health care providers to disclose medical history and information. Britt v. Superior Court of San Diego County (1978) 20 Cal. 3d. 844, 143 Cal Rptr. 695.

With this in mind, the court in Hallendorf v. Superior Court of Santa Clara County (1978) 85 Cal. App. 3d 553, 149 Cal. Rptr. 564 made it clear that disclosure if

medical information must be directly related to the injury claimed by the plaintiff.

In applying these concepts to the referee's order , it should be clear that any documents he reviewed that he felt were not relevant or would be likely to not be relevant should have been excluded from disclosure. Further, unless the medical record dealt specifically with either the treatment by Dr. Billon or Dr. Martinho of the two cysts for which Plaintiff sought their assistance or medical history in which Mrs. Gates specifically consulted physicians concerning lack of stamina or fatigue , such medical history and documentation should not be disclosed.

Plaintiff urges the court to discharge its duty under Slagle v. Superior Court (1982) 211 Cal. App. 3d. 1309 and protect Plaintiff from disclosure of irrelevant medical information.

B. PLAINTIFF OBJECTS THAT THE SCOPE OF ACCESS TO THESE CONFIDENTIAL CONSUMER RECORDS WAS NOT LIMITED BY THE REFEREE SOLELY TO ATTORNEYS AND THEIR RETAINED EXPERTS

In denying the writ of mandate brought by Plaintiff , the Court of appeal suggested that Plaintiff seek a protective order that would limit disclosure of medical records to counsel and their experts. In doing so, the Court of Appeal cited Davis v. Superior Court (1992) 7 Cal. App. 4th 1008 and Moskowitz v. Superior Court (1982) 137 Cal. App. 3d 313.

The Plaintiff has proceeded to attempt to obtain a protective order as suggested. However, disclosure has not been limited to counsel and their experts.

Moskowitz, supra, sets forth the problems attendant to discovery in litigation of confidential records. Likewise, the California Code of Civil Procedure 1985 et seq

recognizes the necessity of protecting confidential consumer records. Moskowitz teaches us two important lessons. First, there is a great potential for misuse of confidential records in a litigation situation. Second, that the party opposing a protective order has the burden to show a substantial reason why disclosure of the confidential consumer information should not be limited to counsel and their retained experts. See also Richards v. Superior Court (1978) 86 Cal.App.3d 265, 150 Cal.Rptr. 77.

In this action, Mrs. Gates had requested that her medical records be protected from disclosure from persons other than counsel for the parties and their retained experts. The referee's decision allows disclosure to others even though the defendants did not make a substantial showing as to why such further disclosure was necessary.

To the extent that medical records for EVA GATES are relevant to the case, they should only be disclosed to counsel and their retained experts.

### C. PLAINTIFF FURTHER ENTERS FOR THE RECORD HER OBJECTION TO THE PROCESS AND PROCEDURE BY WHICH CONFIDENTIAL MEDICAL RECORDS WERE DISCLOSED

Plaintiff contends that because of delay in hearing her requests of the court and referee concerning protective orders regarding her medical records that she has been detrimentally harmed. Her medical records appear to have been obtained when they should not have been without first receiving closer scrutiny from the referee or the court. In addition, the scheduling of her request for in camera inspection, being long delayed and improperly administered has prejudiced her rights to privacy.

The fact that Mrs. Gates' rights have been compromised is reflected in the referee's decision which

refers to the fact that opposing counsel already had medical records and infer that this fact has influenced the referee's decision .

For Plaintiff's counsel, failure of the referee to provide copies of the records reviewed in camera have created problems in assessing whether or not to object to the referee's Statement of Decision. The referee apparently sent the only copy of the records he reviewed to defendants' counsel without first making a copy for the court file as required by California Rule of Court 859.

## CONCLUSION

In the light of the foregoing, the court should modify the decision of the referee to : (1) Eliminate from disclosure all irrelevant information; (2) Limit the disclosure of relevant consumer records to the attorneys and their retained experts.

Date: October 19, 1994

S/Shane Kramer
Attorney for Plaintiff

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Attorney for Plaintiff
EVA M. GATES

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES Plaintiff,

v. Case No. CV074413

SHARON F. BILLON,
M.D., et al., Defendants.

IN LIMINE
PLAINTIFF'S OBJECTIONS TO THE REFERENCE TO DOCUMENTS PRODUCED FOR TRIAL BY DR. SEGAL

(Filed November 2, 1994)

Plaintiff EVA GATES objects to the introduction into evidence or the reference to the following documents produced for trial by Dr. Harold Segal on the basis that they are not relevant to this action or that the probative value of such documents is outweighed by their prejudicial effect:

1. All handwritten prescriptions for Eva Gates.
2. All records of payments for services rendered.
3. All health insurance records and billings.
4. All ECG charts.
5. All x-ray reports, pathology reports, and other testing and lab reports.

6. Letters: From Eva Gates to Dr. Segal dated 6-20-85; From Eva Gates to Dr. Segal dated 9-15-84; From Dr. Soleimany dated 7-13-84; From Dr. Silverstein to Dr. Bell dated 3-9-84.

In addition to the foregoing, all other records produced by Dr. Segal are predisposed to misinterpretation and introduction out of context which would prejudice the Plaintiff. It would be unfair and prejudicial for any of these documents to be introduced unless Dr. Segal testified in order to clarify his impressions and interpretation of his remarks made in the documents.

Further, Plaintiff asserts that under the law already cited to the court, the Plaintiff's privacy rights foreclose the introduction of any of her medical records unless the defendants can make a substantial showing of their relevance and necessity in litigating this case.

DATED: November 2, 1994

S/Shane Kramer
Attorney for Plaintiff

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Attorney for Plaintiff
EVA M. GATES

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES, Plaintiff,

v. Case No. CV074413

SHARON F. BILLON, M.D.
et al., Defendants,

IN LIMINE MOTION TO REQUEST AN
IN CAMERA INSPECTION OF MEDICAL RECORDS

(Filed November 2, 1994)

The plaintiff hereby requests that the court inspect, in camera, plaintiff's medical records which have been submitted to the court under subpoena issued by defendants. The in camera inspection is necessary to eliminate irrelevant or prejudicial records. Plaintiff further request that the court issue an order instructing the defendants and their counsel not to refer to, comment on, examine regarding, or suggest to the jury in any way matters related to plaintiff's medical history which pertains to records excluded by the court in its inspection.

This motion is made on the grounds that part of Plaintiff's medical history and records are not relevant to this

action and any attempt to expose the jury to such information would be highly prejudicial to plaintiff, even if the jury was instructed to disregard it.

The court may exclude this evidence under section 352 of the California Evidence Code. Plaintiff further has a right to privacy in such medical history and records. The burden is on the defendants to show relevance and necessity for disclosure of such information. It is an important concept in California case law that when a plaintiff brings a claim for physical, emotional, or mental injury that the plaintiff is "not obligated to sacrifice all privacy". In re Lifschutz (1970) 2 Cal. 415, 85 Cal.Rptr. 829. The California Supreme Court has directed the courts of our state to be sensitive to the privacy right in this context, to narrowly formulate requests regarding medical history, and impose direct relevance to the injury claimed in requiring a plaintiff or health care providers to disclose medical history and information. Britt v. Superior Court of San Diego County (1978) 20 Cal.3d 844, 143 Cal.Rptr. 695.

With this in mind, the court in Hallendorf v. Superior Court of Santa Clara County (1978) 85 Cal.App.3d 553, 149 Cal.Rptr. 564 made it clear that disclosure of medical information must be directly related to the injury claimed by the plaintiff.

Dated: October 31, 1994

S/SHANE KRAMER
Attorney for Plaintiff

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Attorney for Plaintiff
EVA M. GATES

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES, Plaintiff,

v. Case No. Cvo74413

SHARON F. BILLON, M.D.
et al., Defendants,

# IN LIMINE MOTION TO LIMIT MEDICAL HISTORY INQUIRY

(Filed November 2, 1994)

The plaintiff hereby moves the court for an order instructing the defendants and their counsel not to refer or, comment on, examine regarding, or suggest to the jury in any way matters concerning plaintiff's medical history prior to January 1, 1988.

This motion is made on the grounds that Plaintiff's medical history prior to this time is not relevant to this action and any attempt to expose the jury to such information would be highly prejudicial to plaintiff, even if the jury was instructed to disregard it

The court may exclude this evidence under section 352 of the California Code. Plaintiff further has a right to

privacy in such medical history and records. The burden is on the defendants to show the relevance and necessity for disclosure of such information. It is an important concept in California case law that when a plaintiff brings a claim for physical, emotional, or mental injury that the plaintiff is "not obligated to sacrifice all privacy". In re Lifschutz (1970) 2 Cal. 415, 85 Cal.Rptr. 829. The California Supreme Court ha directed the courts of our state to be sensitive to the privacy right in this context, to narrowly formulate requests regarding medical history, and impose direct relevance to the injury claimed in requiring a plaintiff or health care providers to disclose medical history and information. Britt v. Superior Court of San Diego County (1978) 20 Cal.3d 844, 143 Cal.Rptr. 695.

With this in mind, the court in Hallendorf v. Superior Court of Santa Clara County (1978) 85 Cal.App.3d 553, 149 Cal.Rptr. 564 made it clear that disclosure of medical information must be directly related to the injury claimed by the plaintiff.

Dated: October 31, 1994

S/SHANE KRAMER
Attorney for Plaintiff

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Attorneys for Defendants
BARRY HAMMER and CHRISTOPHER HELENIUS

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES, Plaintiff,

v. Case No. CV078100

COUNTY OF SAN LUIS OBISPO, et al., Defendants,

MOTION FOR ORDER DESIGNATING PLAINTIFF AS VEXATIOUS LITIGANT; REQUEST FOR ORDER REQUIRING SECURITY; NOTICE OF STAY

(Filed December 27, 1995)

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on the above-referenced date and time in the above-referenced department, Defendants BARRY HAMMER and

CHRISTOPHER HELENIUS, will move this court for an order determining that plaintiff EVA GATES is a vexatious litigant pursuant to CCP section 391, et seq. Defendants will further move the court for an order requiring plaintiff to post security. Furthermore, notice is hereby given pursuant to CCP section 391.6, that EVA GATES is stayed from any further activity in this matter until a hearing and ruling upon this motion has occurred.

This motion is made based upon this notice of motion, the court's complete file in this matter, and any other court file in which EVA GATES has been a litigant, and such other matters as the court may consider at the time of hearing.

/ / /

DATED: HENDERSON, WOHLGEMUTH & BOHL

S/Andrew K. Whitman
ANDREW K. WHITMAN, ESQ.
Attorneys for Defendants,
BARRY HAMMER and CHRISTOPHER HELENIUS

AKW: ga
eam\6304\P01

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

On at least two separate occasions, plaintiff EVA GATES has pursued litigation through jury trial in the San Luis Obispo Superior Court. In each instance, following rendition of a judgment, plaintiff GATES has filed suit against the judicial officers involved in her litigation (as well as others).

Plaintiff GATES is aware by virtue of her involvement in San Luis Obispo, Superior Court, Case No. CV075846 that the judicial officers involved in civil litigation have absolute immunity from any liability arising out of their involvement with the litigation. Nonetheless, plaintiff has elected to sue Judge BARRY HAMMER, and appointed referee CHRISTOPHER HELENIUS in the within action for civil liability arising out of their involvement in prior litigation. These circumstances warrant the designation of MS. GATES as a vexatious litigant in that she is pursuing litigation which she knows, based upon prior experience, is without merit.

Additional factors warrant the designation of MS. GATES as a vexatious litigant. This action seeks to impose liability upon JUDGE HAMMER and CHRISTOPHER HELENIUS based upon their conduct which allegedly resulted in disclosure of plaintiff's private medical records in an underlying medical malpractice action. The issue of whether these alleged private records were relevant and discoverable in the underlying action was fully litigated in the underlying action. In fact, during the course of litigation, plaintiff filed a writ with the court of Appeal on the same issue. That issue was denied. In addition, in-cameras review of the medical records was conducted in the underlying litigation for purposes of determining the relevance and discoverability of the records. These issues were revisited at the time of trial.

Finally, the plaintiff has noticed the deposition of JUDGE BARRY HAMMER, the judge that presided over the underlying litigation. Under Evidence Code section 703.5, JUDGE HAMMER may not testify concerning any matters related to the underlying litigation. This fact was brought to plaintiff's attention. She was requested to take JUDGE HAMMER'S deposition off- calendar but GATES has refused to withdraw her notice of JUDGE HAMMER'S DEPOSITION.

EVA GATES IS A VEXATIOUS LITIGANT

A plaintiff's qualification as a vexatious litigant is not limited to numerous unsuccessful in propria personsuits. A vexatious litigant is also one who

> "after a litigation has been finally determined against the person, repeatedly re-litigates, or attempts to re-litigate, in propria persona.... the cause of action, claim controversy , or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined." California Code of Civil Procedure, section 391 (b) (2).

A vexatious litigant is also one who

> "in any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay." California Code of Civil Procedure, section 391 (b) (3).

In this case, the plaintiff should be designated a vexatious litigant because she is pursuing litigation based upon injuries suffered in the course of civil litigation against

the judges involved in that underlying civil litigation. In Case No. CV075846, plaintiff has learned that judges have judicial immunity for their conduct while acting in a judicial capacity. Her filing of this litigation constitutes a repeat of unmeritorious litigation.

Furthermore, the issue she is pursuing in this litigation is an issue that was not only determined in the underlying litigation, but a focal point of the underlying litigation. Consequently , she continues to pursue an issue finally determined in the underlying litigation as identified in CCP section 391 (b) (2).

Finally, she refuses to withdraw notice of her deposition of JUDGE HAMMER, despite the fact that she has been notified that the Evidence Code prohibits JUDGE HAMMER'S testimony concerning the underlying litigation. It should also be noticed that in Case No. CV075846, plaintiff also attempted to take the deposition of Larry Riener and Judge Paul Coffee. These depositions were successfully quashed. Plaintiff is clearly aware of the inappropriateness of taking deposition of a judicial officer.

For all of the foregoing reasons, plaintiff should be designated as a vexatious litigant. Plaintiff is aware of the judicial immunity doctrine based upon her involvement with Case No. CV075846. The identification of this clear immunity has not been sufficient to deter plaintiff's efforts in pursuing judges who can have no liability for their involvement in presiding over civil litigation. In use of the vexatious litigant statute a requirement of posting security is necessary as both a deterrent of plaintiff's efforts as well as protection of judicial integrity that would normally be accomplished by the existence of judicial immunity alone.

PLAINTIFF SHOULD BE ORDERED
TO POST SECURITY

> "In any litigation pending in any court of the State, at any time until final judgment is entered, a defendant may move the court,, upon notice and hearing, for an order requiring the plaintiff to furnish security. The motion must be based upon the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he will prevail in the litigation against the moving defendant." CCP section 391.1.

In his case, the circumstances establishing plaintiff as a vexatious litigant exist, and the clear judicial immunity establishes that there is no reasonable probability of plaintiff prevailing against the moving defendants. Based upon these showings , it is appropriate for the court to require the posting of security.

Under CCP section 391.3, once the court determined that plaintiff is a vexatious litigant and that there is no reasonable probability that she will succeed in litigation against moving defendant, the court shall order plaintiff to furnish, for the benefit of the moving defendant, security in such amount and within such time as the court shall fix.

Here, defendants request a posting of security in the amount of $5,000.00. Defendants have already expended substantial sums of money in preparing for and filing a Demurrer, and it is apparent that additional sums will be incurred in obtaining a protective order against plaintiff's proposed deposition of JUDGE HAMMER. defendants should not be required to bear the burden of these costs where the plaintiff's litigation is clearly unmeritorious, her request to take the deposition of JUDGE HAMMER is both frivolous and precluded by law, and despite being clearly aware of these circumstances, plaintiff persists in her maintenance of these unmeritorious actions.

## THE COURT SHOULD MAKE AN ORDER PROHIBITING PLAINTIFF FROM FILING ANY NEW LITIGATION AGAINST ANY JUDICIAL OFFICER WITHOUT FIRST OBTAINING LEAVE OF COURT

Under CCP section 391.7 the court may, on its own notion or on the motion of any party , enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of the State in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed.

It is apparent that despite her knowledge of judicial immunity plaintiff has not been deterred from filing litigation against the judges who rule relevant to her litigation. In order to preserve judicial integrity, it is important that judges not be subject to civil litigation, In the case of EVA GATES, her knowledge of judicial immunity has not been sufficient to deter her from the pursuit of litigation against the judges who have presided over litigation in which she has been unsuccessful. As a consequence, it is appropriate for the court to prohibit her from filing further litigation against judicial officers without first obtaining leave of court to do so.

## THIS LITIGATION IS STAYED

CCP section 391.6 provides that when a motion for determination of vexatious litigant is made after the initial pleading, the litigation shall be stayed for ten days after the denial of the motion, or the furnishing of required security, as the court shall determine. In this case, the deposition of JUDGE BARRY HAMMER must be stayed until after determination of MS. GATE'S vexatious litigant status has been determined, and if required, she has posted security.

## CONCLUSION

Judicial immunity exists to preserve the integrity of the civil system. If judges were subjected to civil litigation for the rulings they make , there would be a great potential for effecting the judicial officer's integrity. A judge's ruling should not be swayed by the potential that the litigant will sue if the ruling is unfavorable.

Here, plaintiff EVA GATES is well aware of judicial immunity and has chosen to ignore its existence.

Because this is a repeat circumstance for plaintiff and combined with the fact that she refuses to withdraw her Notice of Deposition of JUDGE BARRY HAMMER, the court should determine that MS. GATES is a vexatious litigant and order that she post security in an amount not less than $5,000.00.

Respectfully submitted,

S/Andrew K. Whitman

DECLARATION OF ANDREW K. WHITMAN

I, Andrew K. Whitman , declare as follows:

1. I am an attorney duly licensed to practice law before all courts in the State of California.

2. I am an associate in the law firm of Henderson, Wohlgemuth & Bohl, attorneys of record for defendants BARRY HAMMER and CHRISTOPHER HELENIUS in the relevant action.

3. Upon receipt of plaintiff's Notice of Deposition of JUDGE BARRY HAMMER, I wrote to EVA GATES requesting that she withdraw her Notice of Deposition. I reminded her of judicial immunity, and I pointed out that Evidence Code section 703.5 prohibits JUDGE HAMMER from testifying concerning his involvement in the underlying litigation. MS. GATES has refused to withdraw her Notice of Deposition.

4. This action is plaintiff's second action against judicial officers in a very short period of time. The prior action, San Luis Obispo County Superior Court Case No. CV075846 concluded with the judges being dismissed pursuant to Demurrer based upon the judicial immunity. Consequently, it is abundantly apparent that plaintiff is aware of the judicial immunity doctrine and its application.

5. In Case No. CV075846 the plaintiff also attempted to take the depositions of judicial officers. Motions to Quash were filed and granted.

6. In this action, the underlying litigation involved an issue of the relevancy and discoverability of plaintiff's extensive medical history . The circumstances of plaintiff's prior litigation of this issue are articulately set forth in the Demurrer filed on behalf of defendants Marvin Bauer and Bauer, Harris & McEvoy. Rather than set forth in detail those circumstances and the evidence supporting, defendants refer the court to the memorandum of Points and Authorities filed is support of the Demurrer of Marvin Bauer and Bauer,

Harris & McEvoy, in particular Pages 9 through 11 and the supporting exhibits.

7. Defendants HAMMER and HELENIUS have incurred substantial attorney fees and will continue to incur substantial attorney fees in this litigation. A $5,000.00 security deposit is appropriate to cover anticipated costs in defending both the substance of her complaint and the discovery issues she has raised and is anticipated to raise.

I declare under penalty of perjury that the foregoing is true and correct and based upon my personal knowledge , except those matters which are stated upon information and belief.

Andrew K. Whitman, Declarant

EVA M. GATES
140 South Dolliver Street #69
Pismo Beach, California 93449
(805) 773-4251

Plaintiff, appearing
in propria persona

CALIFORNIA SUPREME COURT
SAN LUIS OBISPO COUNTY

EVA M. GATES, Plaintiff,

v. Case No. CV 078100

COUNTY OF SAN
LUIS OBISPO, et al., Defendants

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS JUDGE BARRY HAMMER AHD REFEREE CHRISTOPHER A. HELENIUS ' MOTION FOR ORDER DESIGNATING PLAINTIFF AS VEXATIOUS LITIGANT; AND REQUEST FOR ORDER REQUIRING PLAINTIFF TO POST SECURITY
(Filed January 11, 1996)

TO DEFENDANTS, AND EACH OF THEM , AND TO THEIR ATTORNEYS OF RECORD:

Plaintiff EVA M. GATES, submits this opposition to Defendants JUDGE BARRY HAMMER and REFEREE CHRISTOPHER A. HELENIUS' motion for order designating plaintiff a vexatious litigant and request for order requiring plaintiff to post security.

This opposition is based on the points and authorities filed herein, declaration of Eva M. Gates, on the Court's files in Case No. CV61331, which reflects the felony and crime against public justice committed by the Court, its executive officer, employees, agents and representatives in that case; and on Case No. CV 075846, which reflects the continued cover-up by the Court, its executive officer employees, agents and representatives in that case; on the Court's file in Case CV 074413, which reflects the abuse of discretion by Referee CHRISTOPHER A. HELENIUS and Defendant JUDGE BARRY HAMMER, in the clear absence of all jurisdiction, in causing unlawful disclosure of Plaintiff's confidential medical records, violating her right of privacy, and depriving plaintiff of due process and equal protection of the law; and this case CV 078100, which reflects the SUPERIOR COURT, COUNTY OF SAN LUIS OBISPO, does not apply laws of the California Constitution or United States Constitution but apply their own custom and policy; and other matters as the court may consider at the time of hearing.

DATED: January 11, 1996

S/Eva M. Gates
Plaintiff, pro per

MEMORANDUM OF POINTS AND AUTHORITIES

It has been the settled doctrine of courts in the united States that immunity granted to judges is not without limit, there being a distinction between acts done in excess of jurisdiction and acts performed in the clear absence of all jurisdiction over the subject matter.

Here, Defendant JUDGE BARRY HAMMER and referee CHRISTOPHER A. HELENIUS were noticed and served, and had full knowledge of the pending writ of review in the appellate court of Plaintiff's Writ of Mandate/Prohibition, " Stay Requested", to limit disclosure of confidential medical records and information.

As the court held in Bradley v. Fisher, 80 U.S. (13 Wall) 335, 351-352, 20 L.Ed.646, 650, "Where there is clearly no jurisdiction of the subject matter, any authority exercised when want of jurisdiction is known to the judge, no excuse is permitted."

In Green v. Zank 158 CA3d 497, 507, 204 CR 770, the Court held, "All authorities recognize that when a judge acts in a clear absence of all jurisdiction he is not protected. "Therefore, immunity is not absolute and in this instance is unavailable.

It has been held repeatedly and recently, that where a statute requires a court to exercise its jurisdiction in a particular manner, follow a particular procedure, or be subject to certain limitations, an act beyond those limits is in excess of its jurisdiction and void. Vershbow v. Reiner (1991) 231 CA3d 879, 883, f282 CR 684.

Contrary to defendants representation, the complaint does address deprivation of constitutional rights under the California Constitution, Article I, Section 1, right of privacy. the allegations are the essential elements of a denial of due process under the Fourteenth Amendment of the United States Constitution culminating in a violation of the privacy act.

COURT'S BIAS , PREJUDICE AND CORRUPTIBILITY FOSTER VEXATIOUS LITIGANTS WHO SEEK JUSTICE

It is the custom and policy of the SUPERIOR COURT, COUNTY OR SAN LUIS OBISPO, to dismiss all cases against it and the COUNTY, its executive officer, employees, agents or representatives. They have the upper hand and in implementing the custom and policy of this court have denied this pro per plaintiff of her constitutional rights, while placing themselves above the law.

Under CCP section 391, et seq., defendants have not met their burden of proving plaintiff a vexatious litigant. Their argument under section 391(b) (1) is not applicable. Plaintiff cannot be adjudged a "vexatious litigant" while earlier lawsuits are still on appeal. California Practice Guide 1:914-928. Likewise under CC section 391 (b)(2) defendants have shown no proof that this section is applicable and have not met their burden. Section 391 (b)(3) is not applicable for Defendants themselves have prevented plaintiff from deposing the defendants and prevented her from moving forward with her case by granting demurrers without leave to amend and dismissing all defendants. Section 391(b)(4) has not and cannot be proven by evidence presented by defendants, for there is none.

Defendants JUDGE HAMMER AND REFEREE HELENIUS must present evidence, mere conclusions in the statutory language are insufficient. Muller v. Tanner (1969) 2 CA3d 445, 464, 82 CR 738. The motion must be supported by a showing that (a) a plaintiff is a vexatious litigant, and (b) "that there is not a reasonable probability that he will prevailing the litigation against the moving defendant." CCP section 391.1, See 3 Cal Practice Rev. section 19:54, 19:55)

Defendants JUDGE HAMMER and REFEREE HELENIUS filed this motion to stay the litigation, thereby avoiding depositions, then changed their minds on December

29, 1995 when at the hearing before the Hon. Rick Brown, he ruled the litigation was not stayed and preceded and ruled sustaining Defendants' HAMMER AND HELENIUS' demurrer without leave to amend. Exhibit "C". Defendants must be sanctioned for filing this frivolous motion and causing plaintiff to use valuable time and money to oppose the motion.

Defendants argue that the unlawful disclosure if plaintiff's confidential medical records; violation of her right of privacy and deprivation of due process and equal protection of law were determined in the underlying litigation. Not so. Attached hereto as Exhibit "A" is a true and correct copy of the judgment signed by Defendant Judge HAMMER and as is plain to see there is no ruling as to unlawful disclosure, violation of right of privacy, or deprivation of due process and equal protection of law.

Defendants open the door for Plaintiff Re notices to depose SUPERIOR COURT executive Officer, Larry Reiner and Judge Paul Coffee. Mr. Reiner had the motive, opportunity and means, out of court and off the record, in Case No. CV 61331 to switch the verdict forms in the locked evidence room at the Veteran's Memorial Building' temporary courtroom. The continued custom and policy of SUPERIOR COURT and COUNTY OF SAN LUIS OBISPO to cover-up for its officials and officers of the court's misconduct , has deprived plaintiff of testimony and information which she is entitled to under the Discovery Act and which is unavailable to her in any other way.

At the time Case No. CV61331 was being litigated, Paul Coffee was not a judge of superior court, but a practicing attorney who had free run of the Superior Court chambers and had daily contact with Judge Warren C. Conklin, the then presiding judge; had contact with the trial Judge R. Donald Chapman and the court Administrator Larry Reiner and was anticipating becoming a judge of superior court. During that same period of time Paul Coffee was

interviewed as a prospective legal representative of plaintiff and her husband in Case No. CV 61331, had frequent contact with plaintiffs and visited on board plaintiff's vessel/home, which was the subject matter of that litigation. It is unquestionably plaintiff's right to question these persons who were intimately involved and who had and do have information which plaintiff cannot obtain through any other source. This court has placed Paul Coffee and Larry Reiner as well as Defendants JUDGE BARRY HAMMER and REFEREE CHRISTOPHER above the law and denied plaintiff the right to depose them under the Discovery Act. CCP section 2025.

## DEFENDANT WHO MOVES FOR SECURITY MUST PROVE PLAINTIFF A VEXATIOUS LITIGANT

The judge must consider evidence, written or oral, by witness or affidavit, material to the ground of the motion, CCP 391.2. defendants have not supported their motion with evidence, but mere conclusions. Muller supra.

The amount of security must also be based on evidence; an order made without some showing in its support is an abuse of discretion. See Muller supra at section 263.

To require plaintiff to post security pursuant to CCP section 391, et seq. is a sure bet for Defendants HAMMER and HELENIUS, due to fact the judge making the ruling will follow the policy and custom of this court, wherein it is never allowed that a pro per plaintiff prevail. Defendants HAMMER and HELENIUS don't have to prove to the court the "plaintiff is a vexatious litigant and that there is not reasonable possibility that he will prevail in the litigation against the moving defendant". To satisfy this burden, defendant must show either: 1) that plaintiff's recovery is foreclosed as a matter of law, or 2) that there are insufficient facts to support recovery by plaintiff on its legal theories

even if all of plaintiff's allegations are accepted as true. Deveraux v. Latham & Watkins (1995) 32 CA4th 1571, 1582, 38 CR2d 849, 855. All these moving defendants have to do is sit back and wait for the visiting judge, who more often than not does not read plaintiff's papers, but follows the custom and policy of those who hire him, to rule in favor of Defendants JUDGE HAMMER and REFEREE HELENIUS, and once again justice hits the dirt.

Defendants HAMMER and HELENIUS want $5000.00 from Plaintiff to pay their legal expenses. The irony of the situation would be laughable, were it not so devastating to justice and fair play. Unclean hands must not beget further unclean hands by ordering plaintiff to pay for Defendants HAMMER and HELENIUS' trumped defense and a sure ruling from the Court in their favor. Had fair, equitable, and legal rulings been handed down by this Court in the first instance, plaintiff would have no need to be in a system so corruptible, biased and prejudiced. Expense of a simple demurrer cannot be devastating to these defendants, whereas they have caused plaintiff to expend thousands over the past ten years seeking justice , and relief from the court.

## JUSTICE DENIED TO ALL EXCEPT THOSE WHO ARE AFFLUENT OR POWERFUL

Defendants JUDGE BARRY HAMMER and REFEREE CHRISTOPHER A. HELENIUS move the court to issue an order prohibiting plaintiff from filing any new litigation against judicial officer without first obtaining leave of court , another sure winner for defendants

Defendants base their notion on plaintiff's "knowledge of judicial immunity". Plaintiff maintains judicial immunity is not absolute and is lost because these moving defendants ruled in the clear absence of all jurisdiction, therefore no immunity is available to them.

## JUDGE BROWN RULES IN SPITE OF DEFENDANTS JUDGE HAMMER AND REFEREE HELENIUS' MOTION STAYING LITIGATION UNDER CCP 391, ET SEQ.

On December 29, 1995, at hearing before the Hon. Rick Brown, Plaintiff placed her objection on the record that the filing of Defendants HAMMER and HELENIUS' motion, under CCP 391, et seq. stayed the litigation and further rulings in this matter were stayed until the motion is ruled on. Over Plaintiff's objection Judge Brown ruled on the demurrers of : 1) COUNTY OF SAN LUIS OBISPO; 2) SUPERIOR COURT, COUNTY OF SAN LUIS OBISPO; 3) defendant JUDGE BARRY HAMMER; and 4) Defendant REFEREE CHRISTOPHER A. HELENIUS, sustaining their demurres without leave to amend, in the clear absence of all jurisdiction. Defendants attempted to stay the litigation but Judge Brown disagreed with the code. Exhibit "C" .

Defendants HAMMER and HELENIUS claim that immunity exists to preserve the integrity of the system. Bias and prejudicial rulings and rulings made in the clear absence of all jurisdiction does nothing to preserve the integrity of the Court. Public officials are not above the law and these defendants must not assume to place themselves beyond answering for their own conduct, which is highly prejudicial and abusive to plaintiff.

Plaintiff has been required, by Defendant JUDGE HAMMER, to pay for the Referee's services, pay for reporters attendance in order to make a record, and must pay for her own depositions and legal expenses. The Court may not consider its behavior against the law, but it seems more than lopsided to rule that plaintiff must bear both her own and defendants' expenses. There is no "level playing field here". Had the Court ruled fairly and according to law, in the first instance, we would not find ourselves in this situation.

## CONCLUSION

Based on the above, Defendants JUDGE BARRY HAMMER and REFEREE CHRISTOPHER A. HELENIUS' motion for order declaring plaintiff as vexatious litigant, and request for order requiring security , must in all fairness, and in the interest of justice, be denied. Defendants have not met their burden of proving plaintiff a vexatious litigant, nor an unjustified litigant.

DATED: January 11, 1996

S/EVA M. GATES
Plaintiff, pro per

DECLARATION OF EVA M. GATES

I, Eva M. Gates, declare as follows:

1. I am the plaintiff in the above-entitled action. I have personal knowledge of the contents of this declaration and if called upon as a witness I could and would competently testify thereto under oath .

2. On November 21, 1995, Defendants JUDGE BARRY HAMMER and REFEREE CHRISTOPHER A. HELENIUS filed Notice of Demurrer and Demurrer to Complaint for hearing on December 29, 1995.

3. On December 27, 1995 Defendants JUDGE HAMMER and REFEREE CHRISTOPHER A. HELENIUS filed an updated and unsigned Motion for Order Designating Plaintiff As Vexatious Litigant; Request for Order Requiring Security; Notice of Stay, hearing date January 18, 1996. Copy filed herewith as Exhibit "A" and incorporated herein by reference.

4. Defendants claim the causes of action have been litigated fully in the underlying case. Copy of Judgment signed by Defendant JUDGE BARRY HAMMER on December 6, 1994, filed herewith as Exhibit "B" and incorporated herein by reference.

5. On December 29, 1995, the Hon. Rick Brown ruled the litigation was not stayed and sustained Defendants HAMMER and HELENIUS demurrer without leave to amend. Copy of transcript of hearing filed herewith as Exhibit "C" and incorporated herein by reference at 5:15-18, 6:14-17, 7:24-25, 8:1-3.

6. During the December 29, 1995 hearing, plaintiff placed her objection on the record based on the filing of defendants Judge HAMMER and referee HELENIUS' motion, under CCP 391 et. seq. stays the litigation. Exhibit "C", 8:4-11.

7. Further , during the December 29, 1995 hearing Attorney Bohl, who represented Defendants JUDGE HAMMER and REFEREE HELENIUS requested the Court to "leave open" the January 18, 1996 hearing on Defendants JUDGE HAMMER and REFEREE HELENIUS' motion declaring Plaintiff a vexatious litigant, Exhibit "C" 16:25-17:1-12.

8. On January 11, 1996 , at time of filing this opposition to defendant HAMMER and HELENIUS' motion, plaintiff had not been contacted by either Attorney Whitman, who served the motion, nor Attorney Bohl, who represented defendants on December 29, 1995 and indicated to the court he wanted the court's permission to leave the hearing open to suit the defendants needs.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed at Pismo Beach, California on January 11, 1996.

S/EVA M. GATES
Plaintiff, pro per.

SUPERIOR COURT OF CALIFORNIA
SAN LUIS OBISPO COUNTY

EVA M. GATES, Plaintiff,

v. Case No. CV 78100

COUNTY OF SAN
LUIS OBISPO, et al., Defendants,

MINUTE ORDER
PROCEEDINGS: MOTION FOR ORDER DESIGNATING PLAINTIFF AS VEXATIOUS LITIGANT AND FOR ORDER REQUIRING PLAINTIFF TO POST SECURITY
(Filed January 18, 1996)

(HONORABLE KENNETH ANDREEN , ASSIGNED)

Plaintiff is present in Court in pro per. Andrew E. Whitman is present in Court on behalf of Defendants Barry Hammer and Christopher Helenius.

Court has read and considered all the received re this motion.

Court request clerk call Court of Appeal for status of the following cases: CV61331 (B-57338)*, CV74413 (B-91098)*, and CV75846 (B-94604)* Clerk at the Court of Appeal advises clerk that their file #B57338 (CV61331) has been affirmed and #B91098 (CV4413) and #B94604 n (CV75846) are pending.

Matter is argued by parties and submitted.

Court finds Eva M. Gates is a vexatious litigant pursuant to Section 391 CCP and orders that Eva M. Gates post security in the sum of $1,150.00 in the event she wishes to proceed with litigation.

Court further orders that prior to Eva M. Gates filing any new litigation against judge, referee or court officer in propria persona, she must obtain a leave of and prefiling order from the judge of the superior court where the litigation is proposed to be filed.

Counsel for the Defendants to prepare order.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES, Plaintiff,

v. Case No. CV078100

COUNTY OF SAN LUIS OBISPO, et al., Defendants,

MOTION FOR RECONSIDERATION OF ORDERS GRANTING MOTION OF DEFENDANTS JUDGE BARRY HAMMER AND REFEREE HELENIUS' DECLARING EVA M. GATES A "VEXATIOUS LITIGANT"; AND ORDER REQUIRING SECURITY BE POSTED; AND ORDER REQUIRING PREFILING ORDER; BE VACATED; DECLARATION OF EVA M. GATES; MEMORANDUM OF POINTS AND AUTHORITIES; PLAINTIFF REQUESTS COURT TAKE JUDICIAL NOTICE AS REQUIRED BY VEXATIOUS LITIGANT STATUTE.

TO DEFENDANTS, AND EACH OF THEM, AND TO THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on March 20, 1996, at 9:00 a.m. or as soon thereafter as the matter may be heard in the Law and Motion Department of this court, located at 1050 Monterey, County Government Center, San Luis Obispo, California, plaintiff will move this court for reconsideration and revocation of its orders re motion of Defendants JUDGE BARRY HAMMER and REFEREE CHRISTOPHER A. HELENIUS, which the court, by minute order, made and entered on January 18, 1996, granting motion of these herein-named defendants, declaring plaintiff Eva M. Gates a "Vexatious Litigant" and ordered plaintiff to post security in the sum of $1,150.00 in the event she

wishes to proceed with litigation. The court further ordered that prior to plaintiff filing any new litigation against judge, referee or court officer in propria persona, she must obtain leave of and prefiling order from the judge of the superior court where the litigation is proposed to be filed. The motion will be made on the ground that a state of new or different facts or circumstances exists, the trial court did not have plaintiff's prior cases before it, nor the judgment and rulings on which the court based its decision ruling plaintiff a "Vexatious Litigant", and on which the Court is required to take judicial notice.

The motion will be based on this motion, on the declaration of Eva M. Gates, memorandum of points and authorities served and filed herewith, on the records and file herein, on such supplemental affidavits or declarations and memoranda of points and authorities as may subsequently be filed herein, and on such evidence as may be presented at the hearing on the motion.

Dated: February 26, 1996

S/Eva M. Gates
EVA M. GATES,
Plaintiff pro per

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RECONSIDERATION OF COURT'S ORDERS

When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted conditionally, or on terms, any party affected by the order may make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order, CCP Section 1008(a).

The motion for reconsideration must be made within 10 days after the moving party has served with written notice of entry of the prior order. The code does not specify that a motion for reconsideration cannot be filed prior to notice of entry of order, or on an interim minute order, so long as plaintiff moves the court for reconsideration within 10 days after being served with written notice of entry of order.

Trial courts have always had inherent jurisdiction to reconsider interim rulings until the ruling is finalized by entry of judgment. Accordingly, the 10-day limitation period set forth in CCP Section 1008(a) is not jurisdictional. Ziller Electronics Lab GMBH v. Superior Court (1988) 206 Cal.App.3d 1222, 1231, 254 Cal Rptr. 410.

The usual test for distinguishing between interim and final rulings is appealibility. A trial court may reconsider an interim ruling at any time up to final judgment, even though the requirements of Code of Civil Procedure Section 1008(a) are not met. Blue Mountain Development Co. v. Carville (1982) 132 Cal.App.3d 105, 1012, 1013, 183 Cal.Rptr. 594. An interim ruling may be corrected at any time up to final judgment, even in the absence of newly discovered evidence. See Ziller Supra.

At the hearing on January 18, 1996, Judge Andreen stated he did not have access to the files of prior suits and their determination. Absent the court records, to which Judicial notice is required to be taken before ruling on a

vexatious litigant motion, the Court erred and abused its discretion in its failure to follow due process.

Declaring plaintiff a "Vexatious Litigant" is a severe and unwarranted designation to be undertaken by the court when a motion for protective order, to prevent Defendant Judge Hammer's deposition, would have been the logical procedure, rather than attacking Gates and branding her a "Vexatious Litigant".

The court should reconsider its original ruling, granting defendants motion to declare plaintiff a "Vexatious Litigant". In the instant, defendants have failed to follow the court's directions to prepare the order after hearing. The losing party is not responsible for the fact that "Notice of Entry of order was not entered as directed by the court, nor is plaintiff responsible for long delay in receiving notice of entry of order. See Stratton v. First Nat. Ins. Co. (App 2 Dist. 1989) 258 Cal.Rptr. 721, 210 Cal.App.3d 1071.

Motion for reconsideration may only be considered before final judgment is entered and while case is still pending in trial court. Betz v. Pankow (App 1 Dist 1993) 20 Cal.Rptr.2d 841, 16 Cal.App.4th 931. The court has failed to set a hearing date as plaintiff requested of Judge Andreen's office on February 20, 1996.

One measure of a "vexatious litigant" is having commenced or maintained more than five in pro per lawsuits within the "immediate preceding" seven year period that have been "finally determined adversely" to the person, CCP 391(b)(1).

Whether the prior lawsuits were "finally determined adversely" to plaintiff is ordinarily a question of fact, i.e. the court is required to take judicial notice of the court files and judgments in the earlier actions. (Emphasis Added).

"Finally determined" means that all avenues for direct review (appeal) have been exhausted or the time for appeal has expired. Childs v. Paine Webber, Inc (1994) 29 Cal.App.4th 982, 994, 35 Cal.Rptr.2d 93, 100. Plaintiff

cannot be adjudged "vexatious litigant" while earlier lawsuits are still on appeal.

This court based its ruling to declare plaintiff a "Vexatious Litigant" on fact that Case No. 61331 (B57338) was affirmed. The court erred in determining that plaintiff, who had sued a public entity, its Board of Commission, Executive Officer and five employees, is a "Vexatious Litigant" under CCP 391(b)(2), where plaintiff was the prevailing party in the underlying case, No. 61331; and Case No. 74413 (Appeal No. B 91098) and Case No. 07546 (B94604) are pending appeal. Childs Supra.

Plaintiff has not filed seven lawsuits within the past five years, nor is plaintiff relitigating the same causes of action against the same defendants.

CAUSES OF ACTION IN CASE NO. 61331-Underlying Case. (Appeal B 57338) Gates v. Port San Luis Harbor District, et al.

A contract action based on five causes of action;
First Cause of Action: General Negligence
Second Cause of Action: Premises Liability
Third Cause of Action: General Negligence-Res Ipsa Loquitur
Fourth Cause of Action: Bailment
Fifth Cause of Action: Breach of Contract

DEFENDANTS IN CASE NO. CV 61331

PORT SAN LUIS HARBOR DISTRICT; JACK RODIN, JR.; HERMAN FLORES; MARLIN STEBBINS; NORM COY, JR.; MATT COLLAR; BILL BARROW; WILLIAM KING; BOARD OF COMMISSION; STEWART JENKINS; GERARD L. PARSONS; JIM CHAMBERS; JIM BLECHA; and DENNIS JOHANSEN

CAUSES OF ACTION IN CASE NO. CV 075846

This case derived from Case No. 61331. Gates v. County of San Luis Obispo, et al. This Court granted demurrers and summary adjudication as to defendants. Case is on appeal, (Appeal B 94604)

First Cause of Action: Violation of Statute-Negligence per se

Second Cause of Action: Violation of Civil Rights-42USC1983

Third Cause of Action: Negligence

Fourth Cause of Action: Violation of Statute-Negligence per se

Fifth Cause of Action: Violation of Civil Rights-42 USC 1983

Sixth Cause of Action: Violation of Civil Rights-42 USC 1983

Seventh Cause of Action: Tax Refund

Eighth Cause of Action: Fraud & Deceit

Ninth Cause of Action: Intentional Inflection of Emotional Distress

Tenth Cause of Action: Negligent Infliction of Emotional Distress

Eleventh Cause of Action: Exemplary Damages

These causes of action are not the same causes of action in Case No. 61331.

DEFENDANTS IN CASE NO. CV 075846

"THE COUNTY OF SAN LUIS OBISPO"; SUPERIOR COURT, COUNTY OF SAN LUIS OBISPO: PORT SAN LUIS HARBOR DISTRICT; SINSHEIMER, SCHIEBELHUT & BAGGETT, A PROFESSIONAL CORPORATION; STEVEN J. ADAMSKI, ESQ.; ROBERT K. SCHIEBELHUT, ESQ.; R. DONALD CHAPMAN; WARREN C. CONKLIN; HARRY E. WOOLPERT; BARRY HAMMER; CHRISTOPHER MONEY and DOES 1

THROUGH 10. These defendants are not the same as sued in the underlying case, No. 61331.

CAUSES OF ACTION IN
CASE NO. CV74413-Underlying case

(Appeal B 91098) Gates v. Sharon F. Billon, M.D., A Professional corporation, et al.

Jury ruled against plaintiff-case is presently on appeal.

A medical malpractice action based on three Causes of Action.

First Cause of Action: General Negligence

Second Cause of Action: General Negligence-Res Ipsa Loquitur

Third Cause of Action: Abandonment

DEFENDANTS IN CASE NO. CV 74413

Sharon F. Billon, M.D., A Professional Corporation

Elena Martinho, M.D.

Susie Morton , Nurse

CAUSES OF ACTION IN CASE NO. CVO78100

This case derives from Case No. 74413. Gates v. County of San Luis Obispo, et al. Appeal No. B 091098, pending in Court of Appeal.

First cause of Action: Wrongful Disclosure of Confidential Medical Records and Information

Second Cause of Action: Violation of Constitutional Right of Privacy

Third Cause of Action: Violation of Civil Rights, Denial of Due Process, Equal Protection of Law and a Fair Trial, 42 USC 1983

Fourth Cause of Action: Violation of Statutes-Negligence per se

Fifth Cause of Action: Negligent Infliction of Emotional Distress

Sixth Cause of Action: Intentional Infliction of Emotional Distress

Seventh Cause of Action: Exemplary Damages

These causes of action are not the same causes of action as in Case No. CV 074413.

DEFENDANTS IN CASE NO. CV 078100

"The County of San Luis Obispo"; Superior Court, County of San Luis Obispo; Barry Hammer; Christopher A. Helenius; Sharon F. Billon, M.D. A Professional Corporation; Elena Martinho, M.D.; Susie Morton; Marvin A. Bauer, Esq.; Bauer Harris & McEvoy; Southern California Physicians Insurance Exchange; Compex, Inc. and Does 1 through 10.

These defendants are not the same defendants in the underlying case, No. 74413 . This case No. 078100 is currently pending in San Luis Obispo Superior Court.

In ruling on the current motion, the Court failed to recite any details of the conduct or circumstances justifying imposing "Vexatious Litigant" status on plaintiff, and failed to incorporate by reference any papers setting forth the conduct or circumstances and legal arguments underlying the court's decision. The Minute Order does not state the Court's grounds for any of the three orders it issued.

At the January 18, 1996 hearing the court based its ruling on "excessive and unnecessary discovery" and "reexploring" the same issues against the same defendants, neither of which is true.

Pursuant to CCP section 2017, section 2019, and section 2025, a party has a right to discovery under California Discovery Act. Plaintiff has had no discovery in either Case No. 075846, nor Case No. 078100. Defendant Judge Hammer was a defendant in the prior lawsuit, Case No. 07856, while concurrently presiding at trial of Case No. 74413.

Defendants claim that Defendant Judge Barry Hammer cannot testify as to any proceedings in which he presided. However, pursuant to Evid Code section 703.5, Defendant Judge can testify as to any statement or conduct occurring at the prior proceeding under the exception in section 703.5, which reads in part:

"except as to a statement or conduct that could.
(d) give rise to disqualification proceedings
under subdivision (5) of Section 170 of the
code of Civil Procedure."

Under CCP 170.1: "(6) For any reason(A) the judge believes his or her recusal would further the interest of justice, (B) the judge believes there is substantial doubt as to his or her capacity to be impartial, or (C) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial, Bias or prejudice towards a lawyer in the proceedings may be grounds for disqualification."

Under Evid. Code Section 703.5(d) a deposition was the means to obtain a statement as to conduct that could give rise to disqualification and ascertain whether the conduct of Defendant Hammer was biased or prejudiced towards plaintiff and/or her attorney at trial, and if he should have disqualified himself on that basis.

Considering the above, Judge Hammer's knowledge and experience , he should have recused himself. Plaintiff having served a single notice of deposition did not warrant a label of "excessive and unreasonable discovery", nor did it warrant plaintiff being declared a "Vexatious Litigant", resulting in deprivation of her Constitutional Rights as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

Defendants moved the court for an order requiring plaintiff to post bond, on the grounds plaintiff is a "Vexatious Litigant" and their claim there is not a reasonable probability that she will prevail in the litigation against the moving defendant.

To satisfy this burden, defendant must show either :1) that plaintiff's recovery is foreclosed as a matter of law, or 2) that there are insufficient facts to support recovery by plaintiff on its legal theories even if all of plaintiff's allegations are accepted as true. Deveraux v. Latham & Watkins (1995) 32 CA 4th 1517, 1582, 38 CR2d 849, 855.

In the instant, defendants failed to meet that burden and the sufficiency of the evidence to sustain that part of the court's order fixing the amount of security at $1,150.00 for attorney fees which are unsupported and not actually incurred. That finding is not supported, where the evidence is undisputed, that defendants did not meet the requirements imposed under CCP section 391, to declare plaintiff a "Vexatious Litigant".

Further, defendants declaration, not dated, but served on December 27, 1995, does not raise any factual issue which would materially affect such determination wherin the only reference is to Case No. 075846. that has not had a final determination and is presently on appeal, therefore not relevant to the issue of security, nor" Vexatious Litigant" determination. See Muller v. Tanner 2 CA3d 445, 463-464, 82 CR 738.

Defendants could have moved for a protective order, under CCP section 2025, in the first instance, reduced costs to their clients, and not subjected their clients, plaintiff, and the court to unreasonable delay in moving this court to declare plaintiff a "Vexatious Litigant", to which defendants failed to meet their burden of proof, but merely repetitiously repeated the statutes. Muller Supra p. 465.

## CONCLUSION

Based on the above, and the fact that the Court's orders violate due process, was error and abuse of discretion, plaintiff requests the court vacate: 1) its order declaring plaintiff a "Vexatious Litigant"; 2) its order that Plaintiff post security in the sum of $1,150.00; 3) its order that Gates must obtain leave of and prefiling order from the Judge of the Superior Court.

Respectfully submitted,

Dated: February 26, 1996

S/EVA M. GATES
plaintiff pro per

DECLARATION OF EVA M. GATES IN SUPPORT OF MOTION FOR RECONSIDERATION OF COURT'S ORDERS

I, Eva M. Gates, declare as follows:

1) I am the plaintiff in the above-entitled action. I have personal knowledge of the contents of this declaration and if called upon as a witness I could and would competently testify thereto under oath .

2) On December 27, 1995, Defendants JUDGE HAMMER and REFEREE HELENIUS filed an undated and unsigned Motion for Order Designating Plaintiff as Vexatious Litigant; Request for Order requiring Security; Notice of Stay . Original motion in court file.

3) On December 29, 1995, at hearing on defendants' demurrers before the Hon. Rick Brown, plaintiff brought the matter of, the Motion for Order Designating Plaintiff as Vexatious Litigant; request for Order Requiring Security; Notice of Stay, to the court's attention and that defendants claimed litigation was stayed until their motion was heard and ruled on. Exhibit "G". copy of hearing transcript, submitted herewith in Plaintiff's Request for Judicial Notice Packet and incorporated herein by reference.

4) On December 29, 1995, over plaintiff's objections, the Hon. Rick Brown ruled that litigation was not stayed and sustained Defendants HAMMER and HELENIUS' demurrer without leave to amend and ruled there would be no deposition of Defendant HAMMER on January 2, 1996. Exhibit "G" as submitted above. 5:15 -18, 6:-17, 7:24-25, 8:1-3.

5) Further on December 29, 1995, at hearing Defense attorney Bohl, who represented Defendants HAMMER and HELENIUS, requested the court "leave open" the January 18, 1996 hearing on Defendants' motion declaring plaintiff a "vexatious litigant ." The court said

defense counsel should notice Gates if she was to appear on January 18, 1996. Defendants did not notice plaintiff.

6) On January 11, 1996 plaintiff filed Opposition to Defendants' HAMMER AND HELENIUS' Motion for Order Designating Plaintiff as Vexatious Litigant; Request for Order Requiring Security. Original Opposition in Court's file.

7) On January 18, 1996, Judge Kenneth Andreen, Assigned, heard and ruled on Defendant HAMMER and HELENIUS' Motion for Order Designating Plaintiff as Vexatious Litigant; Request for Order Requiring Security ; Notice of Stay. Court's Minute Order, Exhibit "C" submitted herewith in Plaintiff's Request for Judicial Notice packet and incorporated herein by reference.

8) The Court's Minute Order of January 16, 1996, does not state the grounds for the rulings, but reflects that Judge Andreen ruled: 1) "Court finds Eva M. Gates is a vexatious litigant pursuant to Section 391 CCP and 2) Orders that Eva M. Gates post security in the sum of $1,150 in the event she wishes to proceed with litigation. " 3) "Court further orders that prior to Eva M. Gates filing any new litigation against judge, referee or court officer in propria persona, she must obtain a leave of and prefiling order from the judge or the superior court where the litigation is proposed to be filed." Exhibit "C". as submitted above.

9) During the January 18, 1996 hearing , Judge Andreen ruled plaintiff a vexatious litigant based on, "She has--in the boat case which is--our number 61331, which is not final--nevertheless, after that case was final, filed an action against court personnel, which sought to reexplore the issues whether or not there was a changing of the verdict form, whether or not the judicial officers had acted improperly. Exhibit "H", p. 13:18-25, 14:1-3, submitted herewith in plaintiff's Request for Judicial Notice packet and incorporated by reference.

10) Further, during the January 18, 1996 hearing, Judge Andreen ruled that plaintiff is doing excessive and unnecessary discovery in the case before the court today (referring to San Luis Obispo Case No. CV078100, p.15:2-5), "she has threatened and wants to conduct unnecessary discovery." Exhibit "H". p.15:24-25, 16:1-11, submitted herewith in Plaintiff's Request for Judicial Notice packet and incorporated herein by reference.

11) Also during the January 18, 1996 hearing, Judge Andreen based his ruling on information the clerk had obtained from the Court of Appeal, as to a final determination of Case No. CV 61331, which he stated he doesn't know if one of the pending appeals has to do with Case No. 61331 and that , "I don't have access to those files." Exhibit "H", p:15:9-19 as submitted above.

12) A new and different set of facts is now presented than was presented at the time the prior motion was heard and ruled on in that facts and circumstances are within personal knowledge of Declarant of which the court is required to take judicial notice and which is requested by plaintiff:

As shown by the transcript , Exhibit "H", submitted herewith in support of this motion for reconsideration the court did not have before it the complaint or final judgment of Case No. 61331, Gates v. Port San Luis Harbor District , et al., in which plaintiff was the prevailing party, and on which the court based its determination plaintiff was a vexatious litigant.

On January 18, 1996 Judge Andreen did order the court clerk to phone the appellate court and did verify case No. 61331 (B57338) was affirmed; Case No. 74413 (B91098) and Case No. 75846 (B94604) were pending before that court. A copy of the Minute Order is submitted herewith as Exhibit "C" and made a part hereof and the court is requested to take judicial notice of its order.

On January 18, 1996, prior to a decision on defendants' motion Judge Andreen failed to take judicial notice of prior litigation and the absence of final decisions in Case 74413 (B91098) and Case No. 75846 (B94604), nor the plaintiff was prevailing party in the final determination of Case no. 61331. Copy of Judgment submitted here as Exhibit "B" to Plaintiff's Request for Judicial Notice packet and incorporated herein by reference.

On July 8, 1994, Judge Hammer was named a Defendant in Case No. 75846, Gates v. County of San Luis Obispo , et al., Copy of Complaint listing defendants submitted as Exhibit "D" to plaintiff's Request for Judicial Notice packet and incorporated herein by reference.

On October 31, 1991, prior to a final determination of Case No. 75846, Defendant Judge Hammer presided at trial over Case No. CV74413, Gates v. Sharon F. Billon, M.D., A Professionals Corporation, et al., while a defendant in Case No. 75846 (B94604) in which a final determination had not been rendered . Copy of Judgment in Case No. 74413 signed by Defendant Judge Hammer is submitted as Exhibit "F" to Plaintiff's Request for Judicial Notice packet and incorporated herein by reference.

Prior to trial of Case No. 74413, Judge Hammer failed to recuse himself, when other judges were qualified to hear the action. It may be determined that such judge , as a defendant in a prior action , is prejudiced against plaintiff or the interest of plaintiff or her attorney appearing in such action or proceeding, while a defendant in plaintiff's current underlying Case No. 74413. Therefore Evid Code section 703.5 is not a bar to the taking of Judge Hammer's deposition , under the provisions of Code of Civil Procedure section 170.6.

Plaintiff served notice of deposition on Defendant Judge Hammer, to be taken on January 2, 1996, to obtain discovery of conduct that could give rise to disqualification proceedings in the underlying case No. 74413.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed at Pismo Beach, California on February 26, 1996.

S/EVA M. GATES
Plaintiff pro per

CALIFORNIA SUPERIOR COURT
SAN LUIS OBISPO COUNTY

EVA M. GATES, Plaintiff,

v. Case No. CV 78100

COUNTY OF SAN LUIS OBISPO, et al., Defendants,

TO THE CLERK OF THE COURT: PLAINTIFF REQUESTS COURT TAKE JUDICIAL NOTICE AS REQUIRED BY VEXATIOUS LITIGANT STATUTE.
[FILED CONCURRENTLY WITH NOTICE OF MOTION AND MOTION FOR RECONSIDERATION OF 1) ORDER GRANTING MOTION OF DEFENDANTS JUDGE BARRY HAMMER; AND REFEREE HELENIUS' DECLARING EVA M. GATES A "VEXATIOUS LITIGANT"; AND 2) ORDER REQUIRING SECURITY BE POSTED ; AND 3) ORDER REQUIRING PREFILING ORDER; BE VACATED]

TO THE CLERK OF THE COURT HEREIN:

Request is hereby made , pursuant to Evidence Code section 451, 452, and 453, that this court take judicial notice of the following documents in support of Motion for Reconsideration and vacating of 1) order granting motion of Defendant REFEREE CHRISTOPHER A. HELENIUS' declaring plaintiff, EVA M. GATES a "Vexatious Litigant"; and 2) order requiring security be posted ; and 3) order requiring prefiling order.

The original of these documents are either in the San Luis Obispo Superior Court file, or by original documents lodged with the Court Clerk.

1. Complaint in Case No. CV 61331 listing the Causes of Action, Gates v. Port San Luis Obispo Harbor District , et al. submitted herewith as Exhibit "A".

2. Defendants listed in Complaint in Case No. CV61331, Gates v. Port San Luis Harbor District, et al, Exhibit "A".

3. Judgment in Case No. 61331, filed with this court on January 28, 1991, submitted herewith as Exhibit "B"

4. Court's Minute Order dated January 18, 1996, wherin court confirmed Case No. CV075846 (Appeal No. B94604), which derived from the underlying case No. 61331, is pending on appeal. Copy of Minute Order submitted herewith as Exhibit "C".

5. Causes of Action listed in Amended Complaint Case No. CV075846, Gates v. County of San Luis Obispo, et al, Copy submitted herewith as Exhibit "D".

6. Defendants listed in Amended Complaint Case No. CV075846 Gates v. County of San Luis Obispo, et al, Exhibit "D".

7. Causes of Action listed in Complaint in Case No. 074413 (Appeal No. B91098), Gates v. Sharon F. Billon, M.D., A Professional Corporation, et al. Copy submitted herewith as Exhibit "E".

8. Defendants listed in Complaint in Case No. CV 074413, Gates v. Billon, M.D., A Professional Corporation, et al. Exhibit "E".

9. Judgment in Case No. 074413, filed with this court on December 6, 1994, submitted herewith as Exhibit "F".

10. December 29, 1995 Transcript of Hearing submitted herewith as Exhibit "G".

11. January 18, 1996 Transcript of Hearing submitted herewith as Exhibit "H".

12. Court's Minute Order dated January 18, 1996 wherein this Court confirmed Case No. CV 074413 (Appeal No. B91098) is pending on appeal. Exhibit "C".

13. Causes of Action listed is Complaint of Case No. CV078100, Gates v. County of San Luis Obispo, et al. Copy submitted herewith as Exhibit "I".

14. Defendants sued in Case No. CV078100, Gates v. County of San Luis Obispo, et al, Exhibit "I".

15. San Luis Obispo County Superior Court Case No. CV 078100 is pending in this court.

16. Request Court take judicial notice that Plaintiff has been denied discovery in Case No. CV 075846 and CV 078100 as the Court's records reflect.

Dated: February 26, 1996

S/EVA M. GATES
Plaintiff pro per

CALIFORNIA SUPERIOR COURT
SAN LUIS OBISPO COUNTY

EVA M. GATES, Plaintiff,

v. Case No. CV78100

COUNTY OF SAN
LUIS OBISPO, et al., Defendants,

MINUTE ORDER
PROCEEDINGS: MOTION FOR RECONSIDERATION
HONORABLE KENNETH ANDREEN, ASSIGNED

(Filed March 20, 1996)

Plaintiff and counsel for defendant argue the motion.
The parties stipulate that Judgments of Dismissal with prejudice may be entered against defendants Judge Barry Hammer and Referee Christopher Helenius, Esq. and against Sharon F. Billon, M.D., A Professional Corporation; Elena Martinho, M.D.; and Susie Morton and that Judge Kenneth Andreen may sign those in place of Judge Carlos Brown.

At request of plaintiff , the court takes judicial notice of the documents submitted by Plaintiff regarding plaintiff as a vexatious litigant.
Plaintiff requests Court state the grounds for declaring plaintiff a vexatious litigant and for the award for fees and costs.

The Court states it was very specific in the January 18, 1996 order and it was very clear.

The Motion for Reconsideration is denied.

CALIFORNIA SUPERIOR COURT
SAN LUIS OBISPO COUNTY

HONORABLE KENNETH ANDREEN

EVA M. GATES, Plaintiff,

v. Case No. CV78100

COUNTY OF SAN LUIS OBISPO, et al. Defendants

EXCERPT OF REPORTER'S TRANSCRIPT OF PROCEEDINGS MARCH 20, 1996
REPORTED BY : LINDA TURNEY, CSR# 2435

MRS. GATES: I ALSO HAVE ONE ON JUDGE HAMMER AND REFEREE HELENIUS IF YOU WOULD LIKE TO HAVE IT.

THE COURT: I DON'T KNOW HOW I CAN SIGN THAT ALTHOUGH MAYBE YOU TWO--I DON'T KNOW IF YOU TWO--

MR. WHITMAN: I HAVE NO PROBLEM STIPULATING THAT YOU CAN SIGN IT. THE ORDER THAT JUDGE BROWN DID SIGN SAID THAT JUDGMENT SHOULD BE ENTERED.

THE COURT: DO YOU WANT TO STIPULATE?

MRS. GATES: IF THAT'S THE ONLY WAY I CAN GET THIS TO A CONCLUSION, YES.

THE COURT: I CAN'T SAY IT'S THE ONLY WAY , BUT I'M WILLING TO SIGN IT IF YOU'LL STIPULATE THAT I HAVE THE SAME POWER AS THE OTHER JUDGE.

MRS. GATES: AS JUDGE BROWN?

THE COURT: YES.

MRS. GATES: THAT'S FINE WITH ME.

THE COURT: ALL RIGHT. GIVE IT TO ME.

MRS. GATES: THERE YOU GO.

THE COURT: OKAY. THESE ARE SIGNED AND THEY'LL BE FILED.

MRS. GATES THEN I WILL NEED COPIES OF THEM WITH THE SIGNATURES, PLEASE, FROM THE CLERK.

THE COURT: OKAY. THE CLERK WILL SEND YOU COPIES. SHE'LL SEND THEM TO YOU, I THINK YOU'RE IN A POSITION NOW TO APPEAL. SO ALL THESE THINGS CAME ABOUT, AND THEN SUBSEQUENTLY NOBODY SENT ANY ORDERS, AND THIS IS WHY THIS COMPLICATION IS HERE.

MR. WHITMAN: I CAN ADDRESS THAT REAL QUICKLY.

MRS. GATES: ANOTHER THING OR TWO I WANTED TO PUT ON THE RECORD IS I HAD REQUESTED IN MY MOTION FOR RECONSIDERATION THAT THE COURT TAKE JUDICIAL NOTICE OF THE DOCUMENTS ON WHICH THEY BASE THEIR DECISION OF DECLARING PLAINTIFF A VEXATIOUS LITIGANT.

THE COURT: THE COURT HAS THAT. THE COURT IS WILLING TO TAKE JUDICIAL NOTICE OF THAT.

MRS. GATES : HAVE YOU TAKEN JUDICIAL NOTICE OR ARE YOU GOING TO?

THE COURT: I'M TAKING IT RIGHT NOW.

MRS. GATES: ALL RIGHT. THANK YOU

(THERE WAS A PAUSE IN THE PROCEEDINGS.)

THE COURT: ANYTHING ELSE?

MRS. GATES: YES, I BELIEVE THAT THE COURT IS REQUIRED TO TAKE JUDICIAL NOTICE , AND YOU'RE TELLING ME YOU'RE JUST DOING THAT.

THE COURT: YES.

MRS. GATES: DUE TO THE COURT'S RULING, ABSENT A PRIOR LAWSUIT BEING ADVERSELY DETERMINED AGAINST PLAINTIFF–

THE COURT: WOULD YOU MIND SAYING THAT AGAIN?

THE CASE FOR JUDGE HAMMER.

THERE IS NO FAIRNESS IN THAT. IT'S PREJUDICIAL AND RESULTS IN AN INJUSTICE TO DO THAT. THE COURT'S REQUIRING PLAINTIFF TO POST THIS BOND IF SHE WISHES TO PROCEED WITH THE LITIGATION , WHEN THE COURT HAS NO SOLID BASIS FOR SUCH CHARGES, AND THEY MUST JUSTIFY THESE CHARGES TO A PRO PER PLAINTIFF THE SAME AS IT WOULD JUSTIFY AN ORDER FOR RULING AGAINST ANY OTHER PLAINTIFF.

ALSO, JUDGES, REFEREES AND COURT OFFICERS ARE NOT ABOVE THE LAW, AND THIS COURT MUST NOT GIVE THEM LICENSE TO BREAK THE LAW NOR CURB A LAW-ABIDING CITIZEN BY ORDERING THAT SHE MUST OBTAIN LEAVE OF FOR PREFILING ORDERS FROM THE SAME JUDGE WHO IS DEPRIVING HER OF HER CONSTITUTIONAL RIGHTS, AND RIGHTS TO ACCESS TO THE COURTS, THE VERY JUDGE WHO SHE FINDS NECESSARY TO SUE IN HER EFFORT TO OBTAIN JUSTICE.

I HAVE REQUESTED THAT YOU TAKE JUDICIAL NOTICE OF THE THREE CASES THAT YOU DID LOOK AT ON JANUARY THE 18TH AT THE HEARING. THE ONE CASE THAT YOU BASED IT ON IS 61331. THE OTHER TWO , 75846 AND 74113, REMAIN ON APPEAL. THEY CANNOT BE USED IN A DETERMINATION FOR VEXATIOUS LITIGANT SO LONG AS THEY ARE ON APPEAL.

PLAINTIFF WOULD REQUEST THAT THE COURT STATE WITH SPECIFICITY WHICH SECTIONS OF CCP 391 IT USED OR IS USING FOR GROUNDS RULING GATES A VEXATIOUS LITIGANT. I ALSO WOULD REQUEST THE COURT STATE WITH SPECIFICITY WHICH OF 391 IT'S USING FOR GROUNDS RULING I MUST HAVE $1,150 IF I WISH TO CONSIDER LITIGATION.

I ALSO REQUEST THIS COURT STATE WITH SPECIFICITY WHICH SECTION OF RULE 391 IT'S JUST USING FOR GROUNDS THAT I MUST OBTAIN LEAVE OF COURT AND A PREFILING ORDER FROM THE SUPERIOR COURT JUDGE.

FURTHER , I WOULD REQUEST THE COURT STATE WITH SPECIFICITY WHICH SECTION OF CASE NUMBER 61331 IT IS USING FOR GROUNDS RULING THAT THE CASE WAS ADVERSELY DETERMINED AGAINST PLAINTIFF.

THE NEXT ONE WAS TO REQUEST YOU TO SIGN THE ORDERS, WHICH YOU HAVE ALREADY DONE FOR ME, SO THAT I CAN MOVE FORWARD.

AND I WONDERED WHY THE COURT DID NOT TAKE JUDICIAL NOTICE OF THOSE CASES IN THE FIRST INSTANCE ON JANUARY THE 18TH.

I THINK THAT'S ALL FOR THE MOMENT, YOUR HONOR. AND I RESERVE THE RIGHT TO REBUT ANYTHING.

THE COURT: THE COURT HAS BEEN VERY SPECIFIC IN ITS JANUARY 18TH ORDER AS TO WHAT IT WAS DOING AND WHY THE MOTION FOR RECONSIDERATION IS DENIED.

MRS. GATES: ON WHAT BASIS , YOUR HONOR?

THE COURT: THE FIRST JUDGMENT WAS RIGHT. YOU ARE A VEXATIOUS LITIGANT.

MRS. GATES: BASED ON WHAT SECTION?

THE COURT: THE CODE SECTIONS THAT I CITED.

MRS. GATES: YOU ONLY CITED CCP391. WHAT SECTION, PLEASE? I'M ASKING FOR SPECIFICITY HERE.

THE COURT : I'VE DONE THE BEST I CAN. THE COURT IS IN RECESS.

MRS. GATES: THAT'S GOOD ENOUGH , YOUR HONOR?

MR. WHITMAN: YOUR HONOR, I HAVE THE ORDER THAT I SHOULD HAVE SUBMITTED PREVIOUSLY WITH ME.

THE COURT: GIVE IT TO THE CLERK. I'LL SIGN IT.

(PROCEEDINGS CONCLUDED )

CALIFORNIA SUPERIOR COURT
SAN LUIS OBISPO COUNTY

EVA M. GATES, Plaintiff,

v. Case No. CV078100

COUNTY OF SAN LUIS OBISPO, et al., Defendant,

ORDER DESIGNATING PLAINTIFF A VEXATIOUS LITIGANT, REQUIRING PRE-FILING ORDERS, AND REQUIRING POSTING OF SECURITY IN CASE NO. CV 87100

(Filed March 20 , 1996)

The motion of defendants, BARRY HAMMER and CHRISTOPHER HELENIUS, for an order designating plaintiff a vexatious litigant , and requiring the posting of security and issuance of a pre-filing order concerning new litigation in propria persona against any judge, referee or court officer, without first obtaining leave of the presiding judge of the court in which the litigation is proposed to be filed, came on regularly for hearing by the Court on January 18, 1996. Plaintiff , EVA M. GATES, appeared in propria persona. moving parties , BARRY HAMMER and CHRISTOPHER HELENIUS, appeared by counsel, Andrew K. Whitman of Henderson, Wohlgemuth & Bohl.

On proof made to the satisfaction of the Court that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is , granted, and that plaintiff, EVA M. GATES, be prohibited from filing any new litigation in the California courts in

propria persona against any judge, referee or court officer , without first obtaining leave of the presiding judge of the court where the litigation is to be filed. Disobedience of this order may be punished as a contempt of court.

In addition, plaintiff is ordered to post security in the amount of one thousand one hundred fifty dollars ($1,150.00) in the event she wishes to proceed further with her litigation in the County of San Luis Obispo Superior Court Case No. CV 078100. The security is to be posted specifically for the purpose of securing against further unnecessary and frivolous discovery in case No. CV 078100.

Dated: 3-20-96

S/ANDREEN
HON. KENNETH ANDREEN
Judge of the Superior Court

CALIFORNIA SUPERIOR COURT
SAN LUIS OBISPO COUNTY

EVA M. GATES, Plaintiff,

v. Case No. CV 078100

COUNTY OF SAN LUIS OBISPO, et al., Defendants,

PLAINTIFF'S OBJECTION TO PROPOSED ORDER DESIGNATING PLAINTIFF A VEXATIOUS LITIGANT, REQUIRING PRE-FILING ORDER AND REQUIRING POSTING OF SECURITY IN CASE NO. CV 078100.

TO THE SUPERIOR COURT, COUNTY OF SAN LUIS OBISPO; TO THE HON. KENNETH ANDREEN, JUDGE ASSIGNED; TO DEFENDANTS JUDGE BARRY HAMMER AND REFEREE CHRISTOPHER HELENIUS AND THEIR ATTORNEYS OF RECORD:

Plaintiff, EVA M. GATES, submits this objection to the proposed order submitted by Defendants JUDGE BARRY HAMMER and REFEREE CHRISTOPHER HELENIUS at hearing on March 20, 1996 Judge Andreen refused to cite with specificity the sections of California Code of Civil Procedure section 391 on which he based his ruling declaring plaintiff a vexatious litigant; refused to cite with specificity the sections of CCP section 391 on which he based his ruling that Gates must pay $1,150.00 "if she wishes to continue litigation"; refused to cite with specificity the sections of CCP section 391 on which he based his ruling that Gates must obtain leave of court and a prefiling order from the presiding judge; refused to cite with specificity the sections of Case No. CV 61331 he used for grounds ruling that that case was "adversely determined against plaintiff",

causing her to be a vexatious litigant"; refused to cite with specificity the sections of CCP 391 on which he based his ruling that Gates will be found in contempt of court if she disobeys this proposed order; refused to cite with specificity the sections of CCP 391 on which he based his ruling that Gates must post security to do future discovery in Case No. CVj078100, when there has been absolutely no discovery done in the case.

Further , plaintiff believes Judge Andreen will be acting in the clear absence of all jurisdiction by signing this proposed order submitted by Defendants HAMMER AND HELENIUS which prohibits Gates "from filing any new litigation in the California courts in propria persona against any judge, referee or court officer, "which deprives Gates of her constitutional rights.

DATED: March 21, 1996

S/ EVA M. GATES
Plaintiff pro per

SUPERIOR COURT OF CALIFORNIA
SAN LUIS OBISPO COUNTY

EVA M. GATES, Plaintiff,

v. Case No. CV078100

COUNTY OF SAN LUIS
OBISPO, et al., Defendants,

MINUTE ORDER

PROCEEDINGS : RULING ON SUBMITTED MATTER
(BAUER MOTION FOR PROTECTIVE ORDER)
( Filed February 5, 1996)
( Hon. Charles A. Piccuta, Temp. Judge)

On 12/15/95 Mrs. Gates (Gates) noticed the depo of Marvin Bauer(Bauer) for 1/4/96. on or about 12/20/95 Bauer called Gates and requested that Bauer depo be continued to a date following hearing and decision of Bauer's pending demurrer to her complaint. On 12/29/95 after Mrs. Gates refused to delay taking his depo, Bauer notified Gates in writing that he was exercising his right under CCP section 2025 (n) to suspend the taking of his depo while he moved for a protective order; in said letter Bauer stated he would not appear for his depo on 1/4/96. on 1/4/96 Bauer filed his notice of and motion for the aforesaid protective order for hearing on 1/31/96. on 1/11/96 J. Andreen sustained without leave Bauer's demurrer to Gates complaint . Gates was present when J. Andreen announced his ruling. On 1/12/96 Bauer served Gates with written notice of J. Andreen's ruling and a copy of a proposed "Order and Judgment of Dismissal" prepared a J. Andreen's direction and for his signature. On 1/23/96 J. Andreen signed and the clerk filed then original of said order and judgment . Nothwithstanding the preceding events on 1/4/96, Gates appeared at McDaniel

Shorthand Reporters for the depo of Bauer and on 1/24/96 filed opposition to the instant motion, in her opposition , Gates requested sanctions (without specifically mentioned CCP section 128.5 or any other statutory authority) against Bauer in the amount of $125.00 for the inconvenience , allegedly, caused by his failure to appear for his depo. presumably because Bauer considered his motion moot on 1/30/96 he called and requested the clerk of the court to take the instant motion off calendar. However, pursuant to local rule 7.06(c) Bauer's motion could not be taken off calendar without the agreement of gates. at the hearing today, Gates stated that she had not been notified by Bauer that he wanted to take the instant motion off calendar, let alone agreeing to doing so and she argued that Bauer should be sanctioned under CCP section 128.5 for (1) failing to make an ex parte application for a order shortening time for hearing of the instant motion, (2) failing to notify her before she filed her opposition (or thereafter) that he wanted to take his motion off calendar (3) failing to appear for his depo on 1/4/96 and (4) otherwise acting in bad faith. THE COURT NOW RULES.

Although Bauer should have moved for a protective order under CCP section 2025 (i) vice (n) this error is harmless. Bauer's motion for protective order is now moot; his motion is order off calendar. Regarding Gates' application for sanctions , any inconvenience suffered by Gates on 1/4/96 was of her own making. Bauer was under no duty to seek an order shorting time in connection with the instant motion. As with her decision to appear at the ill fated depo on 1/4/96, gates proceeded at her own risk to file opposition to the instant motion two weeks after she had actual notice of J. Andreen's ruling on Bauer's demurrer and had been served with a copy of the proposed order and judgment of dismissal; ditto with her decision to appear today and argue for sanctions . WHEREFORE, GATES APPLICATION FOR SANCTIONS IS DENIED.

PUBLISHER'S NOTE:

THE FOLLOWING PAGES WERE UNAVAILABLE FOR FILMING:

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## CONSTITUTION OF THE UNITED STATES

### AMENDMENT XIV

[Citizen's Rights]

**Section 1. Citizenship; Due process; Equal protection.**

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## CONSTITUTION OF THE STATE OF CALIFORNIA

### AS AMENDED AND IN FORCE NOVEMBER 3, 1992

### ARTICLE I
### DECLARATION OF RIGHTS

**SECTION 1.**

**[Inalienable Rights]**

SECTION 1. All people are by nature free and independent and have inalienable rights. Amoung these are enjoying and defending life and liberty, acquiring,

possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy. [New section adopted November 5, 1974.]

## CALIFORNIA RULES OF COURT

[Rules Of Original Proceedings In Reviewing Court]

Rule 56 (c) [Supporting documents] A petition for a writ that seeks review of a trial court ruling shall be accompanied by a record of a trial court ruling shall be accompanied by a record adequate to permit review of the ruling, including:

(1) a copy of the order or judgment from which relief is sought;

(2) copies of all documents and exhibits submitted to the trial court supporting and opposing petitioner's position;

(3) copies of all other documents submitted to the trial court that are necessary for a complete understanding of the case and the ruling;

(4) a transcript of the proceedings leading to the order or judgment below or, if a transcript is unavailable, a declaration by counsel (i) explaining why a transcript is unavailable and (ii) fairly summarizing the proceedings, including arguments by counsel and the basis of the trial court's decision, if stated; or a declaration by counsel stating that the transcript has been ordered, and the date it is expected to be filed,

which shall be a date prior to any action requested of the reviewing court other than issuance of a stay supported by other parts of the record. A full summary of the oral proceedings may be omitted if part of the relief sought is an order requiring preparation of a transcript for the use of an indigent criminal defendant in support of the writ petition, and counsel's declaration demonstrates the petitioner's need for and entitlement to the transcript.

All copies of documents shall be legible.

A petitioner who requests an immediate stay shall explain in the petition the reasons for the urgency and set forth all relevant time constraints.

## SAN LUIS OBISPO COUNTY SUPERIOR COURT RULES

Local Rule of Court 7.06 (c)

All continuance or off-calendar requests must be made by the moving party, and must be with the agreement of the opposing party. A stipulation for a continuance must be filed prior to the continuance, "not signed by both parties, has no effect. A non-stipulated continuance will be granted only on noticed motion, made on an order on shortened time.

## CALIFORNIA CIVIL CODE

**Civil Code, section 47. Privileged publication or broadcast**

**A privileged publication or broadcast is one made:**

**(b) In any (1) legislative . . . proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure, except as follows:**

**(2) This subdivision does not make privileged any communication made in the furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving a party to litigation of the use of that evidence, whether or not the content of the communication is the subject of a subsequent publication or broadcast which is privileged pursuant to this section. As used in this paragraph, "physical evidence" means evidence specified in Section 250 of the Evidence Code or evidence that is property of any type specified in Section 2031 of the Code of Civil Procedure.**

**Civil Code, section 56.10. Authorization; necessity; exceptions**

**(c) A provider of health care may disclose information as follows:**

(4) The information may be disclosed to organized committees and agents of professional societies or of medical staffs of licensed hospitals, or to licensed health care service plans, or to professional standards review organizations, or to utilization and quality control peer review organizations as established by Congress in Public Law 97-248 in 1982, or to persons or organizations insuring, responsible for, or defending professional liability which a provider may incur, if the committees, agents, plans, organizations, or persons are engaged in reviewing the competence or qualifications of health care professionals or in reviewing health care services with respect to medical necessity, level of care, quality of care, or justification of charges.

Civil Code, section 56.105. Professional negligence actions; settlement or compromise; authorization to disclose medical records to persons or organizations defending professional liability

Whenever, prior to the service of a complaint upon a defendant in any action arising out of the professional negligence of a person holding a valid physician's and surgeon's certificate issued pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code, a demand for settlement or offer to compromise is made on a patient's behalf, the demand or offer shall be accompanied by an authorization to disclose medical information to persons

or organizations insuring, responsible for, or defending professional liability that the certificate holder may incur. The authorization shall be in accordance with Section 56.11 and shall authorize disclosure of that information that is necessary to investigate issues of liability and extent of potential damages in evaluating the merits of the demand for settlement or offer to compromise.

Notice of any request for medical information made pursuant to an authorization as provided by this section shall be given to the patient or the patient's legal representative. The notice shall describe the inclusive subject matter and dates of the materials requested and shall also authorize the patient or the patients legal representative to receive, upon request, copies of the information at his or her expense.

Nothing in this section shall be construed to waive or limit any applicable privileges set forth in the Evidence Code except for the disclosure of medical information subject to the patient's authorization. nothing in this section shall be construed as authorizing a representative of any person from whom settlement has been demanded to communicate in violation of the physician-patient privilege with a treating physician except for medical information request.

The requirements of this section are independent of the requirements of Section 364 of the Code of Civil Procedure.(Added by Stats. 1985, c.484, Section 1.)

Civil Code section 56.11 Authorization; form and contents. An authorization for the release of medical information by a provider of health care shall be valid if it :

(a) Is handwritten by the person who signs it or is in typeface no smaller than 8-point type.

(b) Is clearly separate from any other language present on the sane page and is executed by a signature which serves no other purpose than to execute the authorization.

## CALIFORNIA CODE OF CIVIL PROCEDURE

Section 391.6 Stay of proceedings

When a motion pursuant to Section 391.6 is filed prior to trial the litigation is stayed, and the moving defendant need not plead , until 10 days after the motion shall have been denied , or granted, until 10 days after the required security has been furnished and the moving defendant given written notice thereof. When a motion pursuant to Section 391.1 is made at any time thereafter, the litigation shall be stayed for such period after the denial of the motion or the furnishing of the required security as the court shall determine. (Added by Stats. 1963, c. 1471, p.3038, section 1. Amended by Stats. 1975, c.38., p.855, section 2.)

Section 396 Court without jurisdiction:

If an action or proceeding is commended in or transferred to a court which has jurisdiction of the subject matter thereof as determined by the complaint or petition, and it thereafter appears from the verified pleadings, or at the trial , or hearing , that the determination of the action or proceeding, or of a cross-complaint, will necessarily involve the determination of questions not within the jurisdiction of the court, in which the action or proceeding is pending , the court, whenever such lack of jurisdiction appears, must suspend all further proceedings, there in and transfer the action or proceeding and certify the pleadings and all papers and proceedings there in to a court having jurisdiction, thereof which may be agreed upon by the parties, or if they do not agree, to a court having such jurisdiction which is designated by law as a proper court for the trial or determination thereof.

Code of Civil Procedure Section 916; Stay on perfection of appeal:

(a) Except as provided in Section 917.1 to 979 .1, inclusive, and in Section 116.810. the perfecting of an appeal stays proceedings in trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order.

(b) When there is a stay of proceedings other than the enforcement of the judgment , the trial court shall have jurisdiction of proceedings related to the enforcement of the judgment as well as any other matter embraced in the action and not affected by the judgment or order appealed from . Code of Civil Procedure , section 1072. Stay of proceedings; discretion; effect

Proceedings in inferior court may be stayed , or not. If a stay of proceedings be not intended, the words requiring the stay must be omitted from the writ; these words may be inserted or omitted , in the sound discretion of the Court, but if omitted, the power of the inferior Court or officer is not suspended or the proceedings stayed.

Code of Civil Procedure, section 1072. Stay of proceedings; discretion; effcct

PROCEEDINGS IN INFERIOR COURT MAY BE STAYED, OR NOT. If a stay of proceedings be not intended, the words requiring the stay must be omitted from the writ; these words may be inserted or omitted, in the sound discretion of the Court, but if omitted, the power of the inferior Court or officer is not suspended or the proceedings stayed.

Code of Civil Procedure, section 1911. Judgment; items adjudged

**WHAT DEEMED ADJUDGED IN A JUDGMENT.** That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto. (Enacted 1872.)

Code of Civil Procedure, section 2017. Pending actions; scope of discovery; sanctions

(a) Unless otherwise limited by order of the court in accordance with this article, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pleading action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action. Discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter, as well as of the existence, description, nature, custody, condition, and location of any document, tangible thing, or land or other property.

Code of Civil Procedure, section 2036. Perpetuation of testimony or preserving information pending appeal

(a) If an appeal has been taken from a judgment entered by any court of the State of California, or if the time for taking an appeal has not expired, a party may obtain discovery within the scope delimited by Section 2017, and subject to the restrictions set forth in Section 2019, for the purpose of perpetuating testimony or preserving information for use in the event of further proceedings in that court.